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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-416

In the Matter of

Amendment of Section 73.202(b), RM-5112
Table of Allotments,
FM Broadcast Stations
(Keokuk, Iowa)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 19, 1989; Released: October 10, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it an opposition to order to show cause ("Opposition"), a petition for reconsideration, and a petition for stay, all filed by W. Russell Withers, Jr. ("Withers"), licensee of Station KOKX(FM), Channel 237A, Keokuk, Iowa, regarding the Commission's *Report and Order* in this proceeding, 3 FCC Rcd 744 (1988).

BACKGROUND

2. The *Report and Order* allotted Channel 290C2 to Keokuk and modified the license for Station KOKX(FM) accordingly. Because another party filed an expression of interest in Channel 290C2, we allotted Channel 242C2 to Keokuk pursuant to Commission rule 1.420(g) and established a filing window for applications for that channel. Finally, we also deleted Channel 237A at Keokuk.

3. In his Opposition, Withers argues that his license should have been modified to specify Channel 242C2. Withers claims that Channel 242C2 is more desirable than Channel 290C2 because Channel 242C2 is at the lower end of the FM channel band. Withers claims that lower FM channels provide better propagation than higher channels. Withers also notes that Channel 290C2 has a site restriction of 9.6 kilometers (6.0 miles), whereas Channel 242C2 has a site restriction of only 6.0 kilometers (3.7 miles). Withers maintains that because Channel 242C2 is more desirable than Channel 290C2, KOKX(FM)'s license should have been modified to specify Channel 242C2 as a matter of equity.

4. Withers also states that he would prefer to upgrade Channel 237A to Channel 237C1.[1] Withers notes that Channel 237C1 is a higher class channel than 290C2 and is at the lower end of the FM band. He claims that a modification at his present channel would involve no relocation costs. Furthermore, Withers argues that a Class C1 channel would better serve the public interest than a Class C2 channel. Withers notes that the Commission authorized a procedure for automatic on-channel or adjacent channel upgrades nearly a year after he filed his initial petition for rule making.[2] Withers states that he will propose the substitution of Channel 237A to Channel 237C1 and the deletion of Channel 290C2 at Keokuk in a petition for reconsideration. Withers claims that his proposal would require the substitution of Channel 238B1 for Channel 237A at Pekin, Illinois,[3] and the substitution of Channel 291A for Channel 237A at Washington, Iowa, in order to meet the Commission's minimum mileage separation requirements. Withers states his willingness to reimburse the licensee of Station KCII-FM, Channel 237A, Washington, for costs associated in making the change.

5. Withers filed a petition for reconsideration substantially identical to his opposition. The petition for reconsideration includes the channel proposal discussed above, and an engineering statement. Withers also requests, in the event that the co-channel upgrade is not feasible, the assignment of Station KOKX(FM) to Channel 242C2, thereby making Channel 290C2 available for other applicants.

6. Withers also filed a petition for stay requesting that the window period established for filing applications for Channel 242C2 at Keokuk be stayed pending the outcome of the opposition and petition for reconsideration. Withers notes there is a strong likelihood that his petitions will be granted, thereby making Channel 290C2 the channel available for application. Withers argues that failure to grant the stay could consign his station to Channel 290C2. Withers also notes that if the stay is not granted and the Commission accepts his petitions, applicants for Channel 242C2 would have expended funds for engineering studies inapplicable to Channel 290C2, and the Commission would have processed applications that could not be granted.

7. Finally, Withers filed an application for Channel 242C2 at Keokuk.[4] No other applications were received for the channel.

DISCUSSION

8. After careful consideration, we will grant Withers' petition for reconsideration and opposition to order to show cause insofar as they request that we vacate that portion of the *Report and Order* deleting Channel 237A from Keokuk and modifying Withers' license for station KOKX(FM) to specify operation on Channel 290C2, and deny those pleadings and the petition for stay in all other respects.

9. We deny Withers' request to explore the possibility of upgrading Channel 237A to Channel 237C1 at Keokuk in this proceeding. Withers' request for a Class C1 station is untimely. Except in his untimely filed counterproposal, Withers requested a Class C2 station throughout this proceeding. We will not accept Withers' change of preference at this stage in the proceeding. Commission rule 1.429(b)(3) states that a petition for reconsideration must rely on facts previously presented unless the Commission determines that consideration of the new facts presented is required in the public interest. It is not in the public interest to consider at this point Withers' interest in an upgrade of Channel 237A to Channel 237C1. To do so would effectively waive our policies that counterproposals must be advanced in comments and that untimely counterproposals will not be considered. Instead, we will treat the proposal set forth in Withers' petition for reconsideration as a petition for rule making, and we will issue a

separate *Notice of Proposed Rule Making* proposing the substitution of Channel 237C1 for Channel 237A at Keokuk.

10. Withers has clearly established that, despite his earlier request for a modification to Channel 290C2, he now no longer desires the modification. Therefore, because Withers originally requested the modification for his own benefit, and because no other party that has taken the appropriate steps to protect its rights will be adversely affected, we will not force him to accept the modification. As a result, we shall retain Channel 237A at Keokuk and, consequently, make Channel 290C2 available for applicants.[5] In reaching this decision we do not rely in any respect on Withers' allegations that Channel 290C2 is "inferior" to Channel 242C2. Moreover, in accordance with our rules, Withers protected his interest in Channel 242C2 by filing an application for that channel. Accordingly, we will vacate our action modifying Withers' license to specify operation on Channel 290C2.

11. Withers was the only applicant for Channel 242C2 at Keokuk and will be granted a construction permit for the channel simultaneously with adoption of this *Memorandum Opinion and Order*. In the event that Channel 237A is upgraded to Channel 237C1, Withers will be required to file an application to modify that construction permit to specify operation on Channel 237C1. Because the window period for filing applications for Channel 242C2 has closed, and Withers was the only party to file an application for the allotment, we dismiss Withers' petition for stay as moot.

12. We note that if the Commission modifies Channel 237A to Channel 237C1, it will be necessary to delete Channel 290C2 due to interference concerns. In the event that Channel 290C2 is deleted from Keokuk, Channel 242C2 will serve as the substitute to accommodate any other persons interested in pursuing a Class C2 channel at Keokuk.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 24, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel Number
Keokuk, Iowa	237A, 242C2, 290C2

14. The window period for filing applications for Channel 290C2 at Keokuk will open on **November 27, 1989,** and close on **December 27, 1989.**

15. IT IS FURTHER ORDERED, That the *Report and Order*, insofar as it modified the license for Station KOKX(FM), IS VACATED.

16. IT IS FURTHER ORDERED, That the opposition to order to show cause and petition for reconsideration filed by W. Russell Withers, Jr., ARE DENIED.

17. IT IS FURTHER ORDERED, That the petition for stay filed by W. Russell Withers, Jr., IS DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This proposal was originally expressed in an untimely counterproposal submitted by Withers in response to the *Notice of Proposed Rule Making* in this proceeding, 1 FCC Rcd 488 (1986).

[2] *See Co-Channel or Adjacent Channel Upgrades*, 60 RR 2d 114 (1986).

[3] This substitution was accomplished in *Report and Order* (Canton, *et al.*, Illinois), 3 FCC Rcd 5824 (1988), after Withers filed his counterproposal.

[4] File No. BPH-880505NU.

[5] A site restriction of 15.7 kilometers (9.8 miles) southwest of Keokuk will be placed on Channel 290C2 to avoid IF interference with Channel 237A, Keokuk. Coordinates for Channel 290C2 are 40-16-12 and 91-28-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-444

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Pulaski, Virginia) — RM-6861

NOTICE OF PROPOSED RULE MAKING

Adopted: September 20, 1989; Released: October 10, 1989

By the Chief, Allocations Branch:

1. At the request of New River Media Group, Inc. (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 296C3 for Channel 296A at Pulaski, Virginia. Petitioner, licensee of Station WPSK(FM) at Pulaski, also requests the modification of its station's license to specify operation on the higher class co-channel. Petitioner states it will promptly construct the improved facilities, if permitted.

2. Channel 296C3 can be allotted to Pulaski in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.8 kilometers (1.7 miles) southwest of the city.[1] The site restriction is required in order to avoid a short spacing to vacant but applied for Channel 296A at Hot Springs, Virginia. However, based on the site specified in the application for Channel 296A at Hot Springs (BPH-881012ML), the upgrade at Pulaski can be accomplished at the current transmitter site of Station WPSK(FM).[2]

3. As requested, we shall propose to modify Station WPSK's license to specify operation on the higher class co-channel, Channel 296C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Pulaski.

4. In view of the fact that Pulaski, Virginia, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Pulaski, Virginia	296A	296C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 1, 1989,** and reply comments on or before **December 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robert J. Rini, Esquire
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 660
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The restricted site coordinates are 37-01-43 and 80-48-18.

[2] The site coordinates are 37-01-28 and 80-44-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-443

In the Matter of

Amendment of Section 73.202(b), RM-6827
Table of Allotments,
FM Broadcast Stations.
(Lake Arthur, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 20, 1989; Released: October 10, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Jefferson Davis Broadcasting Corporation[1] (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 297C3 for Channel 297A at Lake Arthur, Louisiana, and the modification of its construction permit to specify operation on the higher class co-channel, as that community's first expanded FM service. Petitioner states it will promptly construct the improved facilities, if permitted.

2. Channel 297C3 can be allotted to Lake Arthur in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.9 kilometers (11.1 miles) northeast of the city.[2] As requested, we shall propose to modify the construction permit for Channel 297A at Lake Arthur to specify operation on the higher class co-channel, Channel 297C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Lake Arthur.

3. In view of the fact that Lake Arthur, Louisiana, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lake Arthur, Louisiana	297A	297C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 1, 1989,** and reply comments on or before **December 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Ashton R. Hardy, Esquire
Bradford D. Carey, Esquire
Marjorie R. Esman, Esquire
Walker, Bordelon, Hamlin,
Theriot and Hardy
701 South Peters Street
New Orleans, LA 70130
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Formerly Alden A. Hebert, Jr.

[2] The coordinates for the site specified by the petitioner are 30-07-01 and 92-51-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-442

In the Matter of

Amendment of Section 73.202(b), RM-6837
Table of Allotments,
FM Broadcast Stations.
(Roanoke, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 19, 1989; Released: October 10, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Eagle's Nest, Inc., (petitioner), licensee of Station WELR-FM, Channel 272A, Roanoke, Alabama, seeking the substitution of Channel 272C3 for Channel 272A and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 272C3 can be allotted to Roanoke at the petitioner's suggested site 17.6 kilometers (10.9 miles) south[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 272C3 for Channel 272A at Roanoke, Alabama. As requested, we also propose to modify the Class A license of Station WELR-FM to specify operation on Channel 272C3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 272C3 at Roanoke.

4. Accordingly, in order to provide Roanoke with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Roanoke, Alabama	272A	272C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 1, 1989,** and reply comments on or before **December 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

M. Scott Johnson, Esq.
Catherine M. Grofer, Esq.,
Gardner, Carton & Douglas
1000 Penn. Ave., NW
Suite 750-N
Washington, DC 20004

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates at the petitioner's suggested site for Channel 272C3 at Roanoke are 33-00-00 and 85-26-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-615

In the Matter of

Amendment of Section 73.202(b),	RM-5877
Table of Allotments,	RM-6321
FM Broadcast Stations.	
(Virgie and West Liberty, Kentucky)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 19, 1989; Released: October 10, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 326 (1988), proposing the allotment of Channel 298A to Virgie, Kentucky, as that community's first FM channel at the request of Shelby Valley Broadcasting, Inc. ("Shelby"). East Kentucky Broadcasting Corporation ("East Kentucky") filed a counterproposal requesting the allotment of Channel 298A to West Liberty, Kentucky.[2] Shelby filed comments and reply comments supporting the allotment to Virgie. Cumberland Publishing Company, Inc. filed reply comments in support of the allotment to Virgie, Kentucky. East Kentucky filed reply comments in opposition to the Virgie allotment, and further comments. Langley Franklin ("Franklin") filed reply comments in support of East Kentucky's counterproposal. Franklin also filed a supplement to his reply comments. Shelby filed a motion to strike East Kentucky's further comments, to which East Kentucky filed an opposition.

2. The *Notice* raised the issue of whether Virgie is a community for allotment purposes, since it is not listed in the 1980 U.S. Census. In response, Shelby (petitioner) states that Virgie is listed in the 1985 Rand McNally Road Atlas with a population of 600 persons, and that the 1987 edition of Rand McNally Commercial Atlas shows that Virgie now has a population of 800. Petitioner states that there are three churches in Virgie, a volunteer fire department, two branch banks, each bearing the name "Virgie" in its branch name, the Vesta Johnson Public Library, the R.S. Jones and Sons Funeral Home, a post office, a senior citizens center, a public swimming pool, a doctor, a pharmacy, a five and ten cents store, a variety store, and over 25 other small retail business establishments.

3. East Kentucky, in its comments, states that Shelby has failed to demonstrate that Virgie is a community. East Kentucky contends that the existence of a post office does not demonstrate that Virgie is a community, because most of the customers served by the Virgie post office receive their mail by highway contract delivery. East Kentucky cites *Coker, Alabama*, 43 R.R. 2d 190, 193 (1978), where the Commission held that the existence of a post office does not necessarily demonstrate that the location was chosen to serve residents of a specific community, but might prove only that it was chosen as a desirable location sufficiently far removed from other post offices. East Kentucky states that "the area known as Virgie has no significant boundaries" and that there is only one road sign which identifies Virgie. East Kentucky contends that Virgie is a small area some would term just a 'wide spot in the road'. East Kentucky points out that in past cases, the Commission has held that maps containing a designation of an alleged community only signify a geographical location and do not establish that there is, in fact, a community. *See Vimville, Mississippi*, 55 R.R. 2d 256, 258 (Broadcast Bureau, 1983).

4. In its reply comments, Shelby states that Virgie is not incorporated, but that incorporation is not a prerequisite to community status, citing *Riverside Amusement Park Co. Inc.*, 41 R.R. 2d 423, 426 (1978); *Halston Broadcasting Corporation*, 1 R.R. 2d 982 (Rev. Bd., 1964). Shelby also states that the question of whether Virgie qualifies depends upon whether it is a geographically identifiable population grouping, citing *Boalsburg, Pennsylvania*, 2 FCC Rcd 7148 (MMB, 1987), at paragraphs 3 and 4. Shelby contends that there are differing estimates as to Virgie's population. Virgie's Postmaster estimates the population at 4,000; the school principal estimates it at 1,500, while Rand McNally supplies a figure of 800. These differing estimates result, according to Shelby, from the fact that there are no legally defined boundaries for Virgie, a fact which does not disqualify Virgie to receive an FM allotment. *See Riverside Amusement Park Co., Inc.*, 41 R.R. 2d 423 (1978). Shelby submits a number of letters from local businessmen, written on their printed stationary, clearly identifying their businesses as located in Virgie. Shelby also submits a number of photographs depicting numerous Virgie businesses, as well as photographs depicting two road signs which demonstrate the entrances to Virgie from the communities of Robinson Creek and Jonancy. As to East Kentucky's other arguments, petitioner points out that, in past cases, the Commission has sometimes found that a community did not qualify for a station where it was very small and lacked the indicia of a common group of persons having similar interests. These cases, Shelby submits, have been generally confined to situations where the community was very, very small. Shelby notes that in *Vimville, Mississippi*, 55 R.R. 2d 256 (Broadcast Bureau, 1983), the Commission refused to assign a channel to a community which was listed in the Rand McNally Commercial Atlas as having a population of only 75 persons but argues that the case is inapposite. The 1987 Rand McNally Commercial Atlas shows Virgie with a population of 800 persons, and shows, furthermore, that the population has grown in recent years from 600 in 1985 to 800 in 1987. Shelby also points out that there are several additional channels which can be allotted to West Liberty, in compliance with the Commission's minimum distance separation requirement, which will allow both Virgie and West Liberty to receive first local FM service, thereby eliminating the need for a comparison between the two communities.

5. East Kentucky, in its reply comments, reasserts that Virgie is not a community for allotment purposes. East Kentucky points out that the Virgie public swimming pool, the Virgie senior citizens center and the Virgie public library are funded by Pike County. East Kentucky points out that the petitioner cannot show that Virgie has a newspaper, a hospital, or a city hall, or that Virgie

provides it's own water, electricity or sewage services. It states that Virgie has no autonomous governing body and provides no governmental services.

6. In response to Shelby's reply comments, East Kentucky filed Further Comments contending that Shelby has caused the two highway signs referred to above to be moved in a desperate effort to create the impression that Virgie is 1600 percent larger than it was at the time East Kentucky filed its comments. East Kentucky states that Shelby persuaded the Pike County Magistrate to write a letter, asking that the two existing signs be moved and that two new signs be added. East Kentucky notes that the Highway Department has not authorized the removal of the two existing signs to new locations nor the erection of two new signs, and states that the two signs will be moved back to their former location. East Kentucky contends that the photographs submitted by Shelby create a very misleading impression, because twenty-eight of the businesses depicted in the photographs submitted by Shelby are located beyond the "boundaries" of Virgie as defined by the proper locations of the highway signs. However, East Kentucky states that if the Commission were to allot any of the channels suggested by Shelby to West Liberty, it would file an application for a construction permit and promptly construct a station.

7. Franklin in its reply comments supports the proposed allotment at West Liberty, instead of Virgie. Franklin contends that Virgie is not a community as defined by the Commission and should not be preferred over West Liberty for allotment purposes. Franklin states that, assuming *arguendo*, Virgie were to be considered a community for licensing purposes, it still is not entitled to receive the requested allotment. According to Franklin, the Commission is obligated, under §307(b) of the Communications Act, to determine which of the two mutually exclusive allotment proposals should be granted, and under Commission precedent, the proposal to allot Channel 298A to West Liberty must be granted as a matter of law. Franklin states that West Liberty has a demonstrable need for its first FM station, because West Liberty is an incorporated town which serves as the county seat of Morgan County, Kentucky. Franklin submitted articles which indicate that West Liberty is experiencing tremendous growth, in part because of the construction of a new 44 million dollar prison complex located just three miles west of the town. Franklin also filed a motion for leave to file supplement to reply comments in order to state its position on a proposal which would accommodate the interests of both Virgie and West Liberty, Kentucky. Upon examination of other services in the area, Franklin concludes that Channel 293A can be allotted to West Liberty without precluding the allotment of Channel 298A to Virgie. Franklin supports the allotment of Channel 293A at West Liberty.

8. After consideration of the information filed in this proceeding, we believe that petitioner has provided us with sufficient data to conclude that Virgie is a community for allotment purposes. There are both public and private institutions identifying themselves with the community of Virgie. While Virgie can hardly be described as the most bustling or populous community for which an FM allotment has been sought, the cultural, commercial, and governmental institutions in Virgie, because they identify themselves as Virgie institutions, provide sufficient evidence of Virgie's identity as a community to support our finding that Virgie is a community for allotment purposes. Because channels are available to satisfy each expression of interest filed in this proceeding, we need not address the separate issue of whether West Liberty would prevail over Virgie under the "quiet village" doctrine. *See New South Broadcasting v. FCC*, F.2d (1989) Case No. 87-1303, Slip Op. (D.C. Cir. July 7, 1989). As stated in the *Notice*, Channel 298A can be allotted to Virgie, Kentucky, in compliance with the minimum distance separation requirements of the Commission's Rules.[3]

9. West Liberty is an incorporated community (1980 U.S. Census population 1,381) and is the county seat of Morgan County (1980 Census population 12,107). West Liberty is governed by a mayor and a city council. It is the location of the government offices of Morgan County, the Sheriff's Department and the County court system. We believe that the public interest would be served by allotting Channel 275A to West Liberty, Kentucky, as that community's first local FM service. A staff engineering analysis confirms that Channel 275A can be allotted to West Liberty, Kentucky, in compliance with the minimum distance separation requirements of the Commission's Rules.[4]

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 24, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Virgie, Kentucky	298A
West Liberty, Kentucky	275A

11. The window period for filing applications will open on **November 27, 1989,** and close on **December 27, 1989.**

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of West Liberty has been added to the caption.

[2] Public Notice of the counterproposal was given on April 1, 1988, Report No. 1720 (RM-6321).

[3] The coordinates for Channel 298A at Virgie are 37-20-06 and 82-34-47.

[4] The coordinates for Channel 275A at West Liberty are 37-55-24 and 83-15-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-441

In the Matter of

Amendment of Section 73.606(b), RM-6813
Table of Allotments,
TV Broadcast Stations.
(Calipatria, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 19, 1989; Released: October 10, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Calipatria Television (petitioner) requesting the allotment of UHF television Channel 54 to Calipatria, California, as that community's first local television broadcast service. Petitioner states that it will apply for the channel, if allotted.

2. Calipatria (population 2,636),[1] in Imperial County (population 92,110), is located in southern California, approximately 275 kilometers (170 miles) east of Los Angeles.

3. A staff engineering review has determined that Channel 54 can be allotted to Calipatria consistent with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules, provided the transmitter is sited at least 17.9 kilometers (11.2 miles) east[2] of the community to avoid shortspacing to the co-channel allotment at Avalon, California.[3]

4. In view of the above, the Commisison considers it appropriate to seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Calipatria, California	–	54

5. It should be noted that the Commission has recently imposed a freeze on new television allotments in certain metropolitan areas.[4] However, Calipatria is not one of the communities affected thereby.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 1, 1989,** and reply comments on or before **December 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Michael L. Glaser, Esq.
Joseph P. Benkert, Esq.
Gardner, Carton & Douglas
Republic Plaza
370 - 17th St., Suite 2200
Denver, CO 80202-3520

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures were taken from the 1980 U.S. Census.

[2] Coordinates used for Channel 54 at Calipatria are 33-04-37 and 115-19-46.

[3] Coordinates used for Channel 54+ at Avalon, California, are 33-20-30 and 118-19-30.

[4] *See Notice of Inquiry,* 2 FCC Rcd 5125 (1987), and *Order,* 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-594

In the Matter of

Amendment of Section 73.202(b),	RM-6394
Table of Allotments,	RM-6726
FM Broadcast Stations.	
(Othello and Wilson Creek, Washington)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 19, 1989; Released: October 11, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 699 (1989), issued at the request of P-N-P Broadcasting, Inc. (petitioner), proposing the substitution of Channel 248C2 for Channel 249A at Othello, Washington, and the modification of the construction permit for Station KZLN-FM, Channel 249A at Othello to specify operation on the higher powered channel. Petitioner filed supporting comments reaffirming its intention to apply for the channel. In response to the *Notice*, Jon Bruce Thoen ("Thoen"), filed a counterproposal for the allotment of Channel 248A to Wilson Creek, Washington, as that community's first local FM service, in lieu of the upgrade at Othello.[2] Thoen states that if the allotment is made he will apply for the channel.

2. The proposals are mutually exclusive since they are separated by less than the required spacing of 163 kilometers for Class A to Class C2 co-channel allotments. Therefore, in order to resolve the conflict, we conducted an engineering analysis to determine if alternative channels were available. We have determined that Channel 277A can be allotted to Wilson Creek consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[3] The alternative allotment at Wilson Creek, permits the substitution of Channel 248C2 for Channel 249A at Othello. Channel 248C2 can be allotted to Othello in compliance with the Commission's minimum distance separation requirements.[4] We note that the spacing requirements are also met utilizing the coordinates specified in the petitioner's construction permit (BMPH-890309IB) for Station KZLN-FM.[5]

3. Since both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for the allotments.

4. As requested, we are modifying the construction permit for Station KZLN-FM at Othello to specify operation on Channel 248C2 in lieu of Channel 249A in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

5. In view of the aforementioned, we believe the public interest would be served by allotting Channel 277A to Wilson Creek and Channel 248C2 to Othello, thereby providing a first local FM service and a first wide coverage area FM service, respectively. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Othello, Washington	248C2
Wilson Creek, Washington	277A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station KZLN-FM, Othello, Washington, IS MODIFIED, to specify operation on Channel 248C2 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. The window period for filing application on Channel 277A at Wilson Creek will open on **November 28, 1989,** and close on **December 28, 1989.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Wilson Creek, Washington, has been added to the caption.

[2] Public Notice of the counterproposal was given on April 20, 1989, Report No. 1776.

[3] The reference coordinates for Channel 277A at Wilson Creek are 47-25-24 and 119-07-18.

[4] The reference coordinates are 46-49-36 and 119-10-00.

[5] The coordinates are 46-45-29 and 119-14-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-447

In the Matter of

Amendment of Section 73.202(b), RM-6848
Table of Allotments,
FM Broadcast Stations.
(Coushatta, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 20, 1989; Released: October 11, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of James G. Bethard (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 235C3 for Channel 222A at Coushatta, Louisiana, and the modification of his construction permit to specify operation on the higher powered channel. The proposal could provide Coushatta with its first wide coverage area FM service.

2. Channel 235C3 can be substituted for Channel 222A at Coushatta in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.6 kilometers (4.7 miles) south of the city.[1] As requested, we shall propose to modify the construction permit for Channel 222A at Coushatta to specify operation on the higher class non-adjacent Channel 235C3 in accordance with Section 1.420(g) of the Commission's Rules. Petitioner states that Channel 253C3 is available for allotment at Coushatta as an equivalent channel, if another party should indicate an interest in the Class C3 allotment.

3. In view of the fact that Coushatta, Louisiana, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Coushatta, Louisiana	222A	235C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James G. Bethard
P. O. Drawer C
Coushatta, LA 71019
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the site specified by the petitioner are 31-56-49 and 93-20-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-446

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Trenton, Tennessee) — RM-6834

NOTICE OF PROPOSED RULE MAKING

Adopted: September 20, 1989; Released: October 11, 1989

By the Chief, Allocations Branch:

1. The Wireless Group, Inc. (petitioner), licensee of Station WLOT(FM), Channel 249A, Trenton, Tennessee, has before the Commission a petition for rule making seeking the substitution of Channel 248C3 for Channel 249A at Trenton, Tennessee, and the modification of the license for Station WLOT(FM) at Trenton to specify operation on the higher class co-channel. The proposal could provide Trenton with its first wide coverage area FM service. Petitioner states its intention to operate the higher class channel, if allotted.

2. Channel 248C3 can be allotted to Trenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.9 kilometers (6.8 miles) north of the city.[1] As requested, we shall propose to modify the license for Station WLOT(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Trenton.

3. In view of the fact that Trenton, Tennessee, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Trenton, Tennessee	249A	248C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Carlton Veirs, President
The Wireless Group, Inc.
P. O. Box 198
42 South Washington Avenue
Brownsville, Tennessee 38012
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 36-04-30 and 88-56-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-445

In the Matter of

Amendment of Section 73.202(b), RM-6820
Table of Allotments,
FM Broadcast Stations.
(Athens, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 20, 1989; Released: October 11, 1989

By the Chief, Allocations Branch:

1. At the request of James C. Sliger (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 269C3 for Channel 269A at Athens, Tennessee, and the modification of the license for Station WJSQ(FM) at Athens to specify operation on the higher class co-channel. The proposal could provide Athens with its first wide coverage area FM service. Petitioner states he will promptly construct the improved facilities, if authorized.

2. Channel 269C3 can be allotted to Athens in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.2 kilometers (11.3 miles) east of the city.[1] As requested, we shall propose to modify the license for Station WJSQ(FM) to specify operation on the higher class co-channel, Channel 269C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Athens.

3. In view of the fact that Athens, Tennessee, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Athens, Tennessee	269A	269C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James K. Edmundson, Esquire
Heron, Burchette, Ruckert
& Rothwell
1025 Thomas Jefferson Street, N.W.
Suite 700
Post Office Box 96670
Washington, D.C. 20090
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The requested site coordinates are 35-28-31 and 84-23-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-448

In the Matter of

Amendment of Section 73.606(b), RM-6612
Table of Allotments,
TV Broadcast Stations.
(Montgomery, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 19, 1989; Released: October 11, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Troy State University (petitioner), permittee of Station WTSU-TV, Channel *63, Montgomery, Alabama, seeking to remove the educational reservation now attached to Channel *63, to make it available for commercial application.

2. Petitioner advises that although Channel *63 was allotted to Montgomery at its request,[1] it now believes that it could "offer enhanced service with operations as a commercial facility and that it will be in a more flexible position to provide service and to expand on its goals through the use of such Channel."

3. There is a heavy burden on a proponent seeking to remove an educational reservation to establish that to do so would serve the public interest. There are presently four commercial channels allotted to Montgomery. We wish to garner as much information as possible regarding the potential public interest benefits of dereserving Channel *63 to make it available for commercial use.[2] We note that this proposal is generally contrary to established Commission policy,[3] but we wish to provide an opportunity for full comment on this proposal.

4. Although petitioner has been issued a construction permit on Channel *63 (File No. BPET-870716KF), it will have no protected rights to its use as a commercial facility, if it is ultimately allotted. Rather, the channel must be made available to all interested applicants.

5. A staff engineering analysis has determined that Channel 63 can be allotted to Montgomery in conformity with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules.[4]

6. In view of the above, comments are invited on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Montgomery, Alabama	12,20,*26+, 32,45-,*63+	12,20,*26+, 32,45-,63+

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

M. Scott Johnson, Esq.
Lynn E. Shapiro, Esq.
Gardner, Carton & Douglas
1001 Penn. Ave., NW
Suite 750
Washington, DC 20004

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See* , 2 FCC Rcd 1179 (1987).

[2] In this regard, we have determined that Channel 63 is the only commercial channel available to Montgomery.

[3] *See High Point, NC,* 44 Fed. Reg. 67665 (1979); *Kalamazoo, MI,* 44 Fed. Reg. 67667 (1979); *Vancouver, WA,* 46 RR 2d 1498 (1980); and *Mansfield and Marion, OH,* 45 Fed. Reg. 81203 (1980).

[4] Coordinates used for Channel 63 at Montgomery are 32-22-54 and 86-18-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-44 9

In the Matter of

Amendment of Section 73.202(b), RM-6802
Table of Allotments,
FM Broadcast Stations.
(Kings Beach, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 19, 1989; Released: October 11, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Kidd Communications, Inc. (petitioner), permittee of Channel 299A, Kings Beach, California (BPH-861231ML), seeking the substitution of Channel 299C3 for Channel 299A and modification of its permit accordingly, to specify the higher power channel.[1]

2. We believe this proposal is in the public interest since it could provide a first expanded coverage FM service to Kings Beach. A staff engineering analysis of the proposal reveals that Channel 299C3 can be allotted to Kings Beach at the petitioner's suggested site 14.6 kilometers (9.1 miles) northeast[2] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. In view of the above, we shall propose to substitute Channel 299C3 for Channel 299A at Kings Beach, California. As requested, we also propose to modify the Class A permit issued to petitioner (BPH-861231ML) to specify operation on Channel 299C3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 299C3 at Kings Beach.

4. Accordingly, in order to provide Kings Beach with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Kings Beach, California	299A	299C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Peter Tannenwald, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, DC 20036-5339

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although Kings Beach is located in Zone I, the reference point proposed by petitioner, *infra,* is located in Zone II, which is authorized for Class A, C, C1, C2 and C3 stations only.

[2] Coordinates at the petitioner's suggested site for Channel 299C3 at Kings Beach are 39-18-50 and 119-53-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS
SATELLITE
CORPORATION

Application for Authority to Participate in an INMARSAT Program to Provide for Aeronautical Bandwidth on Second Generation Satellites. File No. CSS 86-005-M(2)

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1989; Released: October 10, 1989

By the Chief, Common Carrier Bureau:

1. On June 16, 1986, the Communications Satellite Corporation (Comsat) filed the above-captioned application requesting authority to participate in a program by the International Maritime Satellite Organization (INMARSAT) to modify the first three INMARSAT second generation spacecraft by increasing to three megahertz the aeronautical mobile satellite (R) service (AMSS (R)) bandwidth on each spacecraft.[1]

2. The application was placed on public notice on June 25, 1986. Aeronautical Radio, Inc. (ARINC) filed an opposition, and McCaw Space Technologies, Inc. (McCaw) and Mobile Satellite Corporation (Mobilesat) filed comments on the application. Comsat filed reply comments to the opposition and further reply comments to Mobilesat's comments. ARINC filed further comments and a motion to accept these comments. Comsat filed a response to ARINC's further comments and a motion to accept this response. ARINC filed an opposition to Comsat's motion to accept further comments. Comsat filed a reply to ARINC's opposition to Comsat's motion.[2]

3. The Commission initially denied this application on January 7, 1987. [3] In its *January 1987 Order*, the Commission found, on the record then before it, that the monopoly status conferred on Comsat by the International Maritime Satellite Telecommunications Act, 47 U.S.C. §§ 751-757, (Maritime Satellite Act) was limited to the provision of maritime satellite services. The Commission also decided to initiate a Rule Making, CC Docket No. 87-75, to consider the institutional, operational, and policy issues relating to access to INMARSAT space segment for provision of aeronautical services.[4]

4. In that proceeding, the Commission found that the provision of INMARSAT aeronautical services in the United States is in the public interest.[5] The Commission emphasized the need for timely and effective U.S. entry into the international aeronautical satellite communications market and decided that such entry could best be provided by permitting Comsat to be the U.S. provider of INMARSAT aeronautical space segment capacity as ancillary to its role as U.S. Signtory and operating entity for INMARSAT maritime services. The Commission concluded that the Maritime Satellite Act did not bar it from adopting such a policy and authorizing Comsat to provide ancillary aeronautical space segment services as the U.S. operating entity in INMARSAT. It found that Comsat's provision of INMARSAT aeronautical services would be ancillary to and supportive of its provision of maritime services and therefore permissible under the Maritime Satellite Act.

5. In view of its decision in CC Docket No. 87-75, the Commission vacated its *January 1987 Order* and delegated to the Common Carrier Bureau authority to act on the application consistent with its decision. We grant the application for the reasons set forth below.

BACKGROUND

6. On December 4, 1985, the Commission granted Comsat's application to participate in INMARSAT's procurement of the first three second generation spacecraft.[6] It authorized Comsat's participation in a second generation procurement based on the need for a follow-on system to meet future maritime satellite telecommunications needs. The first three second generation satellites were also designed to accommodate operations in the frequency bands allocated to the aeronautical mobile satellite services. Each spacecraft was to include bi-directional operational capability of one megahertz in the 1.5/1.6 gigahertz frequency bands. However, no additional expenditures were necessary or included in the contractual arrangements between INMARSAT and its second generation system contractor to achieve this capability. Similarly, the contractual arrangements did not include specific expenditures to modify the transponders or to add special features to the satellite hardware to provide aeronautical services.

7. The INMARSAT Directorate subsequently determined that one megahertz of bandwidth would be inadequate for the international aviation community's long-term service needs. At its July 1986 meeting, the INMARSAT Council decided to modify the design of each of the first three second generation spacecraft to add two megahertz, for a total of three megahertz, of bi-directional spectrum in the AMSS(R) band.[7] The modification required a two megahertz expansion in each spacecraft's shore-to-ship transponder and in channel four of each spacecraft's ship-to-shore transponder.[8] The cost of the modification was estimated not to exceed $3.6 million in January 1984 dollars. The U.S. Signatory's share would be approximately $1.1 million in January 1984 dollars.

8. In support of the application before us to participate in the INMARSAT program to modify the second generation satellites, Comsat states that INMARSAT is positioned to introduce economical aeronautical satellite communications to civil aviation users. According to Comsat, INMARSAT has a 1.5/1.6 gigahertz (or "L-band") maritime satellite system in place, with global coverage encompassing all major civilian air routes, which it will replenish with second generation satellites. Also, Comsat contends that the adjacency of the maritime and aeronautical frequency bands provides the opportunity to use common satellite facilities and similar mobile terminals, and that INMARSAT's proposal to open its maritime satellite system to multipurpose operations would enable efficiencies and economies that will benefit maritime us-

ers as well as aeronautical users. Comsat believes that INMARSAT's proposal represents a prudent solution to satisfy traffic needs and also gives INMARSAT reasonable technical capability to offer a cost-effective alternative to proposed competitive aeronautical systems.

9. Comsat states that there would be no additional charge for increasing the aeronautical band capacity if any subsequent second generation spacecraft were procured. It also states that the second generation system would form INMARSAT's aeronautical space segment infrastructure through the 1990's and into the 21st century, and that aeronautical requirements during this period had been considered in judging the reasonableness of the proposed aeronautical bandwidth expansion.

COMMENTS

10. Arinc opposes both applications. ARINC contends that Comsat lacks the legal authority to participate in the provision of aeronautical services via INMARSAT. Arinc believes that the Maritime Satellite Act and its legislative history express Congress' intent to restrict Comsat's monopoly role as INMARSAT signatory to maritime satellite services. It argues that the exclusive access to the INMARSAT space segment Comsat enjoys for maritime services cannot be extended to aeronautical space segment unless Congress amends the Maritime Satellite Act. Mobilesat agreed that Comsat is not legally authorized to provide aeronautical services through INMARSAT.

11. In addition, Arinc asserts that Comsat has failed to include factual support for those public interest benefits that it claims will result from its participation in INMARSAT's second generation aeronautical program. Arinc claims that Comsat does not explain how the economies and efficiencies of its service would occur, or how aircraft terminals will gain access to the INMARSAT system. It says that Comsat omits facts on the design and technical characteristics of aircraft terminals, and that Comsat does not explain whether aircraft would be on a demand-assigned basis for access; whether aircraft would use Comsat land-based terminals; and whether INMARSAT's system will interface with the current air traffic control and airlines operational communications system used by U.S. aircraft.

12. Mobilesat fears that INMARSAT's aeronautical program will adversely affect domestic mobile satellite systems. It believes that INMARSAT's satellite design could hamper the efficient development of the AMSS(R) band for domestic use because of its low gain global beam antenna, and consequent requirement for higher earth station power. This, coupled with INMARSAT's proposal to use omnidirectional mobile antennas, could preclude use of these frequencies for domestic purposes, according to Mobilesat. It avers that other sharing principles also require consideration.

13. McCaw states its concern that the process for Article 8 notification under the INMARSAT Convention will pose a problem for providers of mobile satellite service. McCaw fears that the INMARSAT notification process may impede development of MSS and that MSS operators could be delayed up to nine months pending review by INMARSAT.

DISCUSSION

14. INMARSAT was created to establish an international maritime satellite system which would improve maritime communications for distress and safety of life at sea, public correspondence, radiodetermination and the management of ships. The Maritime Satellite Act declares that it is the policy of the United States to support the development and operation of a global maritime satellite telecommunications system by INMARSAT. To further this goal, the Act designates Comsat as the sole operating entity of the United States for participation in INMARSAT, and authorizes Comsat to be the owner and operator of the United States' share of jointly owned international space segment and associated facilities, established for the purpose of providing maritime satellite services. The Act, however, also requires the Commission to review, evaluate and authorize Comsat's participation in INMARSAT to protect the public interest. Comsat therefore must apply to the Commission under Title II and Title III of the Communications Act for authority to participate in INMARSAT programs for construction and operation of satellite systems.

15. In reviewing such applications, the Commission normally considers such factors as current spacecraft status, expected traffic growth, contingency plans in the event of satellite failure, need for new services, costs and expected revenue, and other relevant factors. In addition, the Commission considers other elements of the public interest that are not related to economic or service benefits. The United States' obligations under the INMARSAT agreement, the policy embodied in Section 502 of the Maritime Satellite Act and Section 1 of the Communications Act, and general principles of international comity are factors that cannot be quantified but which are integral to the disposition of such applications.[9]

16. In October 1985, the INMARSAT Assembly of Parties proposed amendments to its Convention and Operating Agreement to allow it to offer aeronautical services. As described above, in anticipation of successful completion of this process, the INMARSAT Council in July 1986 decided to modify the design of the second generation spacecraft to include three megahertz of AMSS(R) bandwidth to be used for the provision of aeronautical services. In its application, Comsat seeks approval to join in this limited program.

17. Several of the issues raised by ARINC and the other commenters in response to Comsat's application have been resolved by the Commission in its *Report and Order* concluding CC Docket No. 87-75. In that proceeding, the Commission determined how INMARSAT aeronautical services should be provided in the United States. The Commission found that the provision of INMARSAT aeronautical services in the United States will be in the public interest and determined that such services are best suited to satisfy the communications requirements of aircraft in international flight.[10] In addition, the Commission emphasized the need for timely and effective U.S. entry into the international aeronautical satellite communications market in response to competition in both service and equipment areas. It found that the public interest would be served by Comsat being the U.S. provider of INMARSAT aeronautical space segment capacity as ancillary to and supportive of its role as the U.S. Signatory and operating entity for the provision of maritime services.[11] Accordingly, we need not consider the legal and policy issues raised by Arinc and Mobilesat that have been

decided by the Commission. We need only determine that Comsat's applications are consistent with the Commission's policy decision and the public interest standard of the Communications Act. For the following reasons, we find that Comsat's request to participate in the INMARSAT aeronautical procurement program is consistent with the Commission's decision in CC Docket No. 87-75 and will be in the public interest.

18. First, the program will result in the provision of both commercial and safety services which are not currently available via satellite to international civil aviation users. These services will include search and rescue services; air-to-ground links for the transmission of airlines operational communication; in-flight performance monitoring data; meteorological information; air traffic control services; and public telephone service. Second, the proposed second generation aeronautical program will not have an adverse impact on INMARSAT's provision of maritime services. The addition of two megahertz for aeronautical services will have minimal effect on the amount of capacity available in the second generation system to accommodate maritime services and will not delay delivery of the first three second generation satellites.[12] It is reasonable to expect that a successful aeronautical program will produce sufficient revenues to cover an appropriate share of the costs of the program. Third, the program will allow the early development of aeronautical services in a manner which efficiently uses the orbital and spectral resources. INMARSAT has taken steps to expand the utility of its satellite resources by allowing for aeronautical use at a small incremental cost. INMARSAT believes that the increased use of common space segment resources will result in economies of scale for both maritime and aeronautical uses and a considerable increase in revenue to the organization.

19. We further find that Comsat's provision of aeronautical services via the three MHz bandwidth in the INMARSAT second generation satellites will be ancillary to and supportive of its provision of maritime services. The Commission has already found that there will be a close operational relationship between INMARSAT aeronautical and maritime services. The Commission found that both services will be provided over the same second generation spacecraft and over common and contiguous L-band spectrum using technologically similar terminal equipment. In addition, the Commission found that the incremental cost of adding aeronautical capability to the second generation satellites designed previously for maritime use is only $3.6 million out of a total outlay of $275 million.[13] Finally, we are concurrently authorizing Comsat to use the same coast earth stations for aeronautical services that it now uses for maritime services.[14] In doing so, we find that by spreading costs over a greater number of services, Comsat will have the opportunity to use its facilities more efficiently in a manner beneficial to maritime services customers. Comsat anticipates that the lower resulting costs will, in turn, place added downward pressure on maritime rates. Also, we note that, in introducing aeronautical services, Comsat will take measures to safeguard the operational integrity of both new aeronautical services and present maritime services. In view of these factors, we conclude that granting the application before us would be consistent with the Maritime Satellite Act.

20. As to Mobilesat's argument that INMARSAT's aeronautical program will for technical reasons adversely affect domestic mobile satellite systems, we agree that there could be difficult issues of technical coordination between INMARSAT's aeronautical services and services of domestic mobile satellite systems, but we believe that such issues should not be determinative of our action. First, INMARSAT will be providing a service to aircraft in international flight that is critical to U.S. needs and cannot be provided by the domestic satelites which by their nature have a more limited coverage area than the INMARSAT space segment. Second, we note that at the urging of the United States and other member countries, INMARSAT is taking steps in the planning and design of its future satellite networks (third generation) in order to improve technical compatibility with the U.S. and other domestic mobile satellite systems.

21. We have found no basis for McCaw's concern that the notification process under Article 8 of the INMARSAT Convention may impede development of the domestic mobile satellite system. This application concerns a program to provide aeronautical bandwidth and services over second generation satellites. The INMARSAT Convention, as amended, does not require notification for such aeronautical services but only requires notification for maritime services. Therefore, grant of this application has no bearing on Article 8 requirements.

22. Finally, as a condition on the grant of Comsat's application, we will limit Comsat's provision of aeronautical mobile satellite services (both for AMSS(R) and non-AMSS(R) functions) to aircraft in international flight as defined by the Commission in its decision in CC Docket No. 87-75. In that decision, the Commission said that it would authorize the use of INMARSAT aeronautical services via U.S. aeronautical earth stations for aircraft in flight: (1) from the United States to a foreign point; (2) from a foreign point into the United States; and (3) between any two foreign points.[15] The Commission said that aircraft in international flight may also use the domestic mobile satellite system to the extent the coverage area of that system permits. Aircraft in flight between two U.S. domestic points may use only the domestic mobile satellite system for satellite communications to the extent the coverage area of that system permits. *Id.* at 6079. Comsat will be required to provide service in accordance with this decision.[16]

23. Accordingly, IT IS ORDERED that the application of the Communications Satellite Corporation to participate in a program to provide for aeronautical bandwidth on INMARSAT's second generation satellites, File No. CSS-86-005-M(2), IS GRANTED.[17]

24. IT IS FURTHER ORDERED that Comsat shall provide aeronautical satellite service only to aircraft in international flight as defined in the Commission's decision in CC Docket No. 87-75.

25. IT IS FURTHER ORDERED that Comsat shall account for its aeronautical space station investment and operational costs in a manner consistent with the accounting system and cost allocation procedures filed in accordance with the Commission's requirements in CC Docket No. 87-75.

26. IT IS FURTHER ORDERED that Comsat shall file unbundled rates for space segment and earth station services.

27. IT IS FURTHER ORDERED that Comsat shall develop with AMSC appropriate arrangements for handing off traffic between INMARSAT and AMSC's domestic system in accordance with the Commission's decision in CC Docket No. 87-75. Comsat shall report to the Commission within 180 days of the release of this order on the progress of its discussions with AMSC regarding this matter, and, thereafter continue such reports at 180 day intervals until otherwise directed by the Common Carrier Bureau.

28. IT IS FURTHER ORDERED that the motion of Aeronautical Radio, Inc. to accept further reply comments, in File No. CSS-86-005-M(2), IS GRANTED.

29. IT IS FURTHER ORDERED that the motion of the Communications Satellite Corporation to accept its response to ARINC's further comments IS GRANTED.

30. IT IS FURTHER ORDERED that Comsat shall not participate in any substantive modification to the construction program authorized herein without prior approval from the Commission.

31. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] This application was filed under Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c), and under Sections 214, 309 and 319 of the Communications Act of 1934, 47 U.S.C. §§ 214, 309 and 319 (1985).

[2] We accept the supplemental pleadings filed by both ARINC and Comsat in the interest of providing all parties the opportunity to respond fully to the arguments raised in the proceeding, and because no party will be prejudiced thereby.

[3] Communications Satellite Corporation, 2 FCC Rcd 390 (1987) (January 1987 Order), *appeal docketed*, No. 87-1077/78 (D.C. Cir. February 12, 1987), remanded by Order of the Court on November 22, 1988 in response to the November 15, 1988 Commission request.

[4] Provision of Aeronautical Services via the INMARSAT System, CC Docket No. 87-75, Notice of Proposed Rule Making, 2 FCC Rcd 1976 (1987).

[5] Provision of Aeronautical Services via the INMARSAT System, CC Docket No. 87-75, 4 FCC Rcd 6072 (released August 4, 1989)(Aeronautical Report and Order).

[6] INMARSAT Second Generation Procurement (File No. CSS-85-002), FCC 85-666 (released January 7, 1986)(Second Generation Order), *recon. denied*, 104 FCC 2d 672 (1986), *appeal pending sub nom. Aeronautical Radio, Inc. v. FCC*, Case No. 86-1382 (D.C. Cir. filed June 6, 1986)(Motion for Voluntary Dismissal filed September 15, 1989).

[7] The international Radio Regulations allocated at that time a total of 14 MHz uplink and 14 MHz downlink for AMSS(R). International Telecommunication Union, *Radio Regulations* Art. 8, Sec. IV (1979).

[8] The expansion would increase the frequency range in the shore-to-ship frequency bands from 1545 to 1548 MHz and would increase the range in the ship-to-shore frequency bands from 1646.5 to 1649.5 MHz.

[9] *See, e.g.*, Second Generation Order at 4.

[10] Aeronautical Report and Order at 6078.

[11] *Id.* at 6087.

[12] INMARSAT plans the first launch in mid to late 1990 with additional launches at four to six months intervals.

[13] Aeronautical Report and Order at 6086, 6087.

[14] Communications Satellite Corporation, (File Nos. I-T-C-89-076; CSG-89-058-ML; CSG-89-059-ML) DA 89-1259 (Adopted September 28, 1989).

[15] Aeronautical Report and Order at 6078. The Commission recognized that as, to the first two categories, certain international flights may have more than one point of entry into the United States or more than one point of departure from the United States. It determined that aircraft enroute between two U.S. domestic points as part of an international flight may use only the domestic mobile satellite system for satellite communications to the extent the coverage area of that system permits. *Id.* at 6090, n. 28.

[16] Additionally, in accordance with the Commission's decision, Comsat is required to consult with the American Mobile Satellite Company (AMSC) to establish appropriate arrangements for handing off traffic between INMARSAT and the AMSC domestic system for both AMSS(R) and non-AMSS(R) communications. The Commission has left development of the specifics of these arrangements to the licensees and their prospective customers. The Commission expects its licensees to closely coordinate with the FAA to ensure that the AMSS(R) hand-off arrangements are consistent with applicable FAA policy and regulations. In addition, it expects that the hand-off procedures between the various systems will be developed by various aeronautical standard setting organizations and that Commission licensees will comply with these standards. *Id.* at 6079.

[17] Amendments to the INMARSAT Convention and Operating Agreement permitting INMARSAT to provide aeronautical services will not formally enter into force until October 13, 1989. However, we are authorizing Comsat to begin service before that date if necessary to meet customer requirements. We believe that such action is in the public interest and permissable under the INMARSAT agreements since the amendments have been accepted by the requisite number of INMARSAT members.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-458

In re Applications

W.B.A. BROADCASTING CORP. (hereafter W.B.A.)	File No. BPH-870910MI
LORRAINE M. WIGGINS (hereafter Wiggins)	File No. BPH-870910MJ
DOCK JUNCTION RADIO LIMITED PARTNERSHIP (hereafer DJRLP)	File No. BPH-870910ND
SOUTH GEORGIA BROADCASTING COMPANY, INC. (hereafter South Georgia)	File No. BPH-870910NQ
JAMES P. McGAHAN (hereafter McGahan)	File No. BPH-870910NR

For a Construction Permit For a
New FM Station in Dock Junction, Georgia on
Channel 290A

HEARING DESGNATION ORDER

Adopted: September 27, 1989; Released: October 10, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *W. B. A.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. W.B.A. has not completed Item 4 correctly. The W.B.A. application gives post office box numbers as the residence address for its principals. Accordingly, W.B.A. must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. *Unresolved Issues. DJRLP.* Information before the Commission indicates that DJRLP was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question DJRLP's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against DJRLP in this proceeding.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and DJRLP have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by DJRLP would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
W.B.A.	June 13, 1988
DJRLP	October 27, 1988; November 23, 1988; May 9, 1989; May 16, 1989; June 13, 1989

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party-in-interest to the application of Dock Junction Radio Limited Partnership.

2. To determine whether Dock Junction Radio Limited Partnership's organizational structure is a sham.

3. To determine, based on the evidence adduced pursuant to issues 1 and 2 above, whether Dock Junction Radio Limited Partnership possesses the basic qualifications to be a Commission licensee.

4. To determine with respect to DJRLP, whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That W.B.A. shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by W.B.A. and DJRLP ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-450

In the Matter of

Amendment of Section 73.202(b),	RM-6806
Table of Allotments,	
FM Broadcast Stations.	
(Rogers, Arkansas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 19, 1989; Released: October 12, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of R & R Broadcasting, Inc. (petitioner), licensee of Station KAMO-FM, Channel 232A, Rogers, Arkansas, seeking the substitution of Channel 232C3 for Channel 232A, and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 232C3 can be allotted to Rogers at the petitioner's specified site[1] 8.8 kilometers (5.5 miles) northeast of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2]

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 232C3 for Channel 232A at Rogers, Arkansas. Although petitioner requested the issuance of an *Order to Show Cause* in connection with its modification request, such action is not required. Rather, in accordance with established Commission policy, we will propose to modify the Class A license of Station KAMO-FM, as requested by petitioner, in the event Channel 232C3 is substituted for Channel 232A at Rogers, Arkansas. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 232C3 at Rogers.

4. Accordingly, in order to provide Rogers with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Rogers, Arkansas	232A	232C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James A. Koerner, Esq.
Baraff, Koerner, Olender
& Hochberg, P.C.
2033 M Street, NW
Suite 700
Washington, DC 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's specified site are 36-24-00 and 94-04-00.

[2] Use of the petitioner's proposed site clears the site specified in the construction permit BPH-880720IA, issued to Station KIXQ(FM), Channel 230C2, Webb City, Missouri, at coordinates 34-14-34 and 94-30-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-451

In the Matter of

Amendment of Section 73.202(b), RM-6628
Table of Allotments,
FM Broadcast Stations.
(Keokuk and Washington, Iowa)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 19, 1989; Released: October 12, 1989

By the Chief, Allocations Branch:

1. In a separate *Memorandum Opinion and Order* adopted simultaneously with this *Notice*, we denied in pertinent part a petition for reconsideration filed by W. Russell Withers, Jr., (petitioner), licensee of Station KOKX(FM), Channel 237A, Keokuk, Iowa, of the Commission's *Report and Order* in MM Docket No. 86-416, 3 FCC Rcd 744 (1988). We took that action because petitioner's request to upgrade its station from Channel 237A to 237C1 was untimely in that proceeding. However, because petitioner set forth an acceptable channel proposal, on our own motion we are treating that portion of the petition for reconsideration advancing the upgrade proposal as a petition for rule making. In order to accomplish this substitution petitioner requests the deletion of vacant Channel 290C2 at Keokuk, and requests that the license of Station KCII(FM) at Washington, Iowa, be modified to specify Channel 291A in lieu of its present Channel 237A.[1] Petitioner submitted information in support of his proposal.

2. Channel 237C1 can be substituted for Channel 237A at Keokuk in compliance with the Commission's minimum mileage separation requirements and can be used at the present transmitter site of Station KOKX(FM),[2] provided that Channel 290C2 is deleted at Keokuk.[3] In addition, Channel 291A can be substituted for Channel 237A at Washington at the present transmitter site of Station KCII(FM).[4] Therefore, we are herein issuing a *Show Cause Order* to Washington Radio, Inc., licensee of Station KCII-FM at Washington, seeking comments as to why its license should not be modified to specify operation on Channel 291A in lieu of Channel 237A.

3. Commission policy requires that the party benefiting from a channel change reimburse an affected party for reasonable costs incurred in changing frequencies. Petitioner has indicated his willingness to reimburse Washington Radio, Inc., for reasonable expenses incurred in changing frequencies.

4. As requested, we shall propose to modify the license of Station KOKX(FM) to specify operation on Channel 237C1. In accordance with Section 1.420 of the Commission's Rules, we shall not accept other expressions of interest in the proposed channel for use at Keokuk.

5. In view of the fact that Keokuk, Iowa, could receive a wide coverage FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Keokuk, Iowa	237A, 242C2, 290C2	237C1, 242C2
Washington, Iowa	237A	291A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, Washington Radio, Inc., licensee of Station KCII(FM), Channel 237A at Washington, Iowa, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 291A in lieu of Channel 237A.

7. Pursuant to Section 1.87 of the Commission's Rules, Washington Radio Inc. may, not later than **December 4, 1989** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Washington Radio, Inc. to furnish additional information. If Washington Radio, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Washington Radio, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Washington Radio, Inc., P.O. Box 524, Washington, Iowa, 52353.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows: William P. Bernton, Esq. 1001 Pennsylvania Avenue, N.W.; Suite 750 Washington, D.C. 20004 (Counsel for petitioner).

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner also requests the substitution of Channel 238B1 for Channel 237A at Pekin, Illinois, to accommodate his proposal. The Pekin substitution was adopted in *Report and Order* (Canton *et al.,* Illinios), 3 FCC Rcd 5824 (1988).

[2] Site coordinates for Channel 237C1 at Keokuk are 40-24-38 and 91-25-57.

[3] Channel 290C2 is presently unoccupied, although a filing window for applications was opened in the *Memorandum Opinion and Order* (Keokuk, Iowa), MM Docket No. 86-416. However, in the event that Channel 237C1 is substituted for Channel 237A, petitioner will be ordered to file an application for modification of his construction permit for Channel 242C2, Keokuk, Iowa, to specify Channel 237C1, thereby vacating Channel 242C2. As announced in the *Memorandum Opinion and Order, id.,* Channel 242C2 will serve as the substitute for Channel 290C2.

[4] Site coordinates for Channel 291A at Washington are 41-18-18 and 91-42-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-456

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Vero Beach, Florida) — RM-6831

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 12, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Treasure Coast Media, Inc. (petitioner), requesting the substitution of Channel 269C3 for Channel 269A at Vero Beach, Florida, and modification of its license for Station WCXL(FM) to specify operation on the higher powered channel. Channel 269C3 can be allotted to Vero Beach in compliance with the Commission's minimum distance separation requirements.[1]

2. As requested, we shall also propose to modify petitioner's license for Station WCXL(FM) to specify operation on Channel 269C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Vero Beach or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 269C3 for Channel 269A at Vero Beach, since it could provide that community with an expanded radio service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Vero Beach, Florida	228A, 269A, 259C2, 279C2	228A, 269C3 259C2, 279C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Ann C. Farhat
Bechtel, Borsari, Cole & Paxson
2101 L Street, N.W., Suite 502
Washington, D.C. 20037
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 27-38-18 and West Longitude 80-23-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-457

In the Matter of

Amendment of Section 73.202(b), RM-6857
Table of Allotments,
FM Broadcast Stations.
(Carthage, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 12, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Carthage Broadcasters (petitioner), seeking the allotment of Channel 282A to Carthage, Texas, as that community's second local FM service. Petitioner states an intention to apply for the channel, if allotted. Channel 282A can be allotted to Carthage in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Carthage could receive its second local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Carthage, Texas	255C1	255C1, 282A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 4, 1989**, and reply comments on or before **December 19, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jerrold Miller, Esquire
Miller & Fields, P.C.
P. O. Box 33003
Washington, D. C. 20033
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The reference coordinates are 32-09-24 and 94-20-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-519

In the Matter of

Amendment of Section 73.202(b), RM-6379
Table of Allotments,
FM Broadcast Stations.
(Beaumont and Big Bear Lake,
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1989; Released: October 13, 1989

By the Chief, Allocations Branch:

1. At the request of Eastland Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 6458 (1988), proposing the allotment of Channel 269A to Beaumont, California, as its first local FM service. In order to accomplish its proposal in compliance with Section 73.207(b) of the Commission's Rules, petitioner also requested the substitution of Channel 231A for Channel 269A at Big Bear Lake, California, licensed to Mountain Broadcasting Company, Inc. ("MBC") for Station KTOT(FM), and the concomitant modification of its license. Additionally, Station KTOT(FM) would be required to relocate its transmitter to accommodate the petitioner's proposal. Petitioner filed comments stating its intention to apply for the channel, if allotted. MBC filed opposing comments. The petitioner submitted reply comments, and later filed a supplement to the reply comments. MBC also filed reply comments.[1]

2. Petitioner premised its proposal on the belief that Station KTOT(FM) might be required by the U.S. Forest Service to relocate from its current site. In its comments, Eastland states that the U.S. Forest Service intends to require MBC to relocate KTOT, because the land is not designated as an electronics site. In its reply, MBC counters that it is not in any present danger of forced relocation by the U.S. Forest Service. In this regard, MBC provided documentation from the District Ranger of the Big Bear Ranger District confirming that the Forest Service expects to renew MBC's special use permit for Station KTOT at its existing site for a ten year period. Therefore, MBC objects to the change proposed by the petitioner.

3. In reply comments, petitioner advises that in view of the U.S. Forest Service's plans to renew MBC's special use permit for Station KTOT's current site, it withdraws its proposal for allotment of Channel 269A to Beaumont and urges consideration of Channel 273A instead.

4. A staff analysis of petitioner's proposal reveals that Channel 273A cannot be allotted to Beaumont in conformity with Section 73.207 of the Commission's Rules,[2] since it is 146 kilometers from Channel 273B, Tijuana, Mexico,[3] whereas 175 kilometers is required between Class A and B co-channels. Thus, petitioner's amended proposal will not be considered.

5. On the basis of the foregoing, and since Commission policy refrains from making an allotment which would require the involuntary relocation of a stations transmitter site, petitioner's proposal will be dismissed. *See Claremore, OK*, 3 FCC Rcd 4037 (1988).

6. Accordingly, IT IS ORDERED, That the petition for rule making filed by Eastland Broadcasting Corporation (RM-6379) requesting the allotment of Channel 269A to Beaumont, California, IS HEREBY DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's supplement was filed one day late and was not accompanied by a motion to accept. However, since the supplement merely seeks to supply original executed Declarations of its consulting engineer, in lieu of facsimile copies contained in exhibits to its reply comments, no prejudice will result from its acceptance.

[2] Coordinates for Channel 273A at Beaumont are 33-50-12 and 116-56-36.

[3] Coordinates for Channel 273B, Tijuana, are 32-31-26 and 117-04-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-259

In the Matter of

Amendment of Section 73.202(b),	RM-5892
Table of Allotments,	RM-6292
FM Broadcast Stations.	RM-6463
(Faribault, Blooming Prairie,	RM-6464
Northfield and New Prague,	
Minnesota)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1989; Released: October 12, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 3702 (1988), issued in response to three separate petitions. KDHL, Inc. (KDHL) requested the substitution of FM Channel 298C2 for Channel 240A at Faribault, Minnesota. KDHL also requested modification of its license for Station KDHL-FM to specify operation on Channel 298C2. Richard Johnson filed a petition proposing the allotment of Channel 298C2 to Faribault, Minnesota, as that community's second FM service. That petition has been treated as an expression of interest in the allotment of Channel 298C2 to Faribault. Blooming Prairie Development Corporation (BPDC) requested the allotment of FM Channel 299A to Blooming Prairie, Minnesota, as that community's first FM broadcast service. Kingsley H. Murphy, Jr. (Murphy) filed a counterproposal requesting the substitution of Channel 239A for Channel 238A at New Prague, Minnesota, and modification of his construction permit for Station KCHK-FM to specify operation on Channel 238A. KYMN, Inc. (KYMN) filed a counterproposal requesting the allotment of FM Channel 298C2 to Northfield, Minnesota, as that community's first FM broadcast service, or in the alternative allotment of Channel 298A or 297A.[2] KDHL and Judith Clarine filed comments in support of Channel 298C2 at Faribault. BPDC and Jan Ingstad, President of Sleepy Eye Broadcasting, Inc., filed comments supporting the allotment of Channel 299A at Blooming Prairie, Minnesota. Richard Johnson, BPDC and KYMN filed reply comments. Murphy, BPDC and KYMN filed reply comments in response to the counterproposal. KDHL filed late reply comments.

2. The counterproposal filed by KYMN, licensee of day time AM Station KYMN, Northfield, Minnesota, requests the allotment of Channel 298C2 to Northfield, as that community's first full time commercial channel. In the alternative, KYMN requests the allotment of Channel 298A or any other Class C2 or Class A Channel to Northfield to provide a first FM service. KYMN asserts its proposal for Northfield should be preferred over KDHL's and Richard Johnson's for Faribault and BPDC's proposal for Blooming Prairie. KYMN indicates that Faribault is served by both a full-time AM commercial station and a full-time FM commercial station while Northfield has only a day time AM commercial station serving the community. KYMN states that although Channel 299A would provide a first local FM service for Blooming Prairie, there is another Class A Channel available for that community. KYMN states its intention to apply for a channel at Northfield but also states interest in a channel at Faribault.

3. Kingsley H. Murphy, permittee of Station KCHK-FM, New Prague, Minnesota,[3] filed a counterproposal requesting the substitution of Channel 239A for Channel 238A at New Prague. Murphy states that he is the licensee of AM Station KCHK, New Prague. Murphy wishes to co-locate his AM and FM operations but the Channel 238A allotment prohibits such joint operation from the same tower. According to Murphy, the substitution of Channel 239A for 238A will permit the FM operation to co-locate with KCHK(AM) provided Channel 298C2 is substituted for Channel 240A at Faribault and a new transmitter site is located for Channel 298C2.

4. Jan Ingstad, President of Sleepy Eye Broadcasting, Inc. (Ingstad) supports the allotment of Channel 299A to Blooming Prairie. Ingstad states he is the holder of a construction permit for Channel 297A at Sleepy Eye, Minnesota. The permit currently specifies a transmitter site west of the community. Ingstad further states that an attempt will be made, for business purposes, to locate the transmitter site on the eastern side of Sleepy Eye, which would conflict with the proposed allotment at Faribault. According to Ingstad, the Blooming Prairie allotment will provide a first local service to the community and allow Sleepy Eye Broadcasting flexibility in the location of a new station in Sleepy Eye, Minnesota.

5. BPDC believes the allotment of Channel 299A to Blooming Prairie as a first local FM service should be preferred over the allotment of a channel to Faribault. According to BPDC, the allotment of Channel 298C2 as a substitute for Channel 240A, or as a second FM service, would not provide a first or second full time aural service, nor would a first local service result at Faribault. BPDC feels the only public interest benefit for Faribault would be the provision of the first wide area service in the region, while the allotment of Channel 299A to Blooming Prairie will provide that community with its first local outlet. BPDC argues that in similar situations, the Commission has determined that the allotment of an FM channel resulting in the provision of first local service prevails over other alternatives such as a channel upgrade.

6. KDHL filed comments restating its interest in the substitution of Channel 298C2 for Channel 240A at Faribault.

7. In reply comments, BPDC, Richard Johnson, KYMN, Murphy and KDHL restated their positions. BPDC responded to Murphy, permittee of Station KCHK-FM, New Prague, by arguing that potential co-location of Murphy's AM and FM facilities is insufficient justification to deny service to Blooming Prairie in favor of the substitution of Channel 239A for 238A at New Prague. KYMN (Northfield) contends that Murphy wishes to accommodate his preference for a particular site location and does not claim unavailability of its present site nor does he submit a showing indicating what new areas are

to be covered and the extent to which those areas are currently unserved or underserved. KYMN advocates the allotment of Channel 265A to Blooming Prairie, which would make Channel 298C2 available for Northfield. BPDC (Blooming Prairie) indicated a willingness to apply for the use of Channel 265A at Blooming Prairie, provided it must wait no longer for availability of Channel 265A than for resolution of its petition in this proceeding.[4] Murphy (New Prague) argues that his counterproposal should be adopted because it would bring a first full time aural service to New Prague, and Channel 298C2 should be substituted for Channel 240A at Faribault, providing a first wide area FM service to the community. Murphy states that co-location of his AM & FM facilities will not only be economically efficient for him but will permit location of his FM transmitter some ten miles closer to key population centers in southeastern Minnesota, thereby increasing the spectrum efficiency of his Class A facility and increasing his listening audience.

8. Based on expressions of interest, we find that all the communities herein are deserving of receiving new or improved FM service. However, we have determined that channels are not available to resolve all the conflicts. Therefore, having concluded that the proposals set forth herein should be comparatively considered, we are guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First aural service;

(2) Second aural service;

(3) First local service;

(4) Other public interest matters.

[co-equal weight given to priorities (2) and (3).]

The allotment of Channel 298C2 at Faribault does not fulfill any of the first three priorities since no showing of first or second aural service was provided by KDHL, Inc. KDHL also requested modification of its license for Station KDHL-FM to specify operation on Channel 298C2 in lieu of Channel 240A. The *Notice* indicated, however, that the proposed modification could not be implemented if another party expressed interest, unless an additional equivalent channel could be made available in accordance with Section 1.420(g) of the Rules. Richard Johnson and Judith Clarine indicated their intention to file an application for Channel 298C2 at Faribault as that community's second FM service. A Commission engineering analysis indicates no other Class C2 Channels are available for Faribault. Therefore, KDHL-FM's license cannot be modified as requested, and Channel 298C2, if allotted to Faribault, would be allotted as a second FM service and a third local service. The counterproposal filed by Murphy requesting the substitution of Channel 238A for 229A at New Prague is dependent on Channel 240A being deleted at Faribault. Therefore, Channel 240A in Faribault prevents the proposed substitution at New Prague. The proposed allotment of Channel 299A to Blooming Prairie or Channel 298C2 to Northfield could provide a first local FM broadcast service to either community. There are only 70 kilometers between Blooming Prairie and Northfield instead of the 105 kilometers required by the rules between first adjacant A to C2 Channels, preventing the allotment of both Channel 299A to Blooming Prairie and Channel 298C2 at Northfield. However, a staff analysis confirms that Channel 265A can be allotted to Blooming Prairie providing a first local service for the community. Thus, a comparison of the communities of Faribault and Northfield must be made, considering such factors as location, population and reception services.

9. Faribault is an incorporated community located approximately 50 miles south of Minneapolis-St. Paul and is the seat for Rice County. The 1980 Census indicates the population for Faribault is 16,241. Faribault is served by two radio stations, one FM and one AM, which provide the community with local full time service. Faribault also receives three commercial full time AM services and two commercial FM services. Northfield, also an incorporated community, is located approximately 35 miles south of Minneapolis-St. Paul and has a 1980 population of 12,562. There is one day time AM station licensed to Northfield. The community receives full time commercial service from five FM stations and three AM stations.

10. Based on the above discussions, we believe that the public interest would best be served by allotting Channel 298C2 to Faribault, Minnesota, as that community's second FM service. We believe the gain in diversity of media voices are significantly greater from an allotment to Faribault, because of its larger population and consequent need for diversity. We note that Faribault, with a population of 16,241, has fewer full time reception services (5 services) than Northfield with a population of 12,562 (8 services). Channel 298C2 can be allotted to Faribault in compliance with minimum distance separation requirements provided there is a site restriction 11.8 kilometers (7.3 miles) southwest of the community.[5] The site restriction will prevent a conflict with Channel 298C1, Station WCCN-FM, Neilsville, Wisconsin. In response to the petition filed by Blooming Prairie Development Corporation, we find that Channel 265A can be allotted to Blooming Prairie in compliance with the Commission's spacing requirements without a site restriction.[6]

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Blooming Prairie, Minnesota	265A
Faribault, Minnesota	240A, 298C2

12. The window period for filing applications for Channel 298C2 at Faribault, Minnesota, will open on **November 28, 1989** and close on **December 28, 1989.** The window for Channel 265A at Blooming Prairie, Minnesota, will be withheld until the license for Station KJLY(FM), Blue Earth, Minnesota, is modified to specify operation on Channel 283C2 in lieu of Channel 265A.

13. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send By Certified Mail, Return Receipt Requested, a copy of this *ORDER* to the following:

Susan Wing
Marissa G. Repp
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072
(Counsel for Minn-Iowa Christian Broadcasting, Inc.;
Blue Earth, Minnesota)

14. IT IS FURTHER ORDERED, That the petitions of KYMN, Inc. (RM-6464) and Kingsley H. Murphy, Jr. (RM-6463) are dismissed.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Northfield and New Prague have been added to the Caption.

[2] Public Notice of the counterproposal for New Prague (RM-6463) and for Northfield (RM-6464) was given on August 11, 1988, Report No. 1743.

[3] File No. BPH-860506MG.

[4] By *Report and Order* in MM Docket 86-491, Channel 265A was deleted from Blue Earth, Minnesota, effective March 20, 1989. *See* 4 FCC Rcd 1260 (1989), *recon. denied* by *Memorandum Opinion and Order*, adopted June 28, 1989.

[5] The coordinates for Channel 298C2 at Faribault are 44-14-14 and 93-23-41.

[6] The coordinates for Channel 265A at Blooming Prairie are 43-52-06 and 93-03-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR (TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1989; Released: October 10, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board are: (a) an interlocutory Appeal, filed September 5, 1989, by Garden State Broadcasting Limited Partnership from the discovery *Order*, FCC 89M-2177, released August 28, 1989, of Administrative Law Judge Richard L. Sippel (ALJ); (b) a companion Motion for Stay, filed September 12, 1989; (c) an Opposition to the Appeal, filed September 12, 1989, by WWOR-TV, Inc. (WWOR); and (d) a companion Opposition to the Motion for Stay, filed September 18, 1989.

2. Garden State first appeals from a ruling by the ALJ ordering it to produce various documents, over which material it had interposed mostly general claims of attorney-client and work product privileges. However, pursuant to routine practice, the ALJ's *Prehearing Conference Order*, FCC 88M-2506, released August 2, 1988, had advised all parties that any forthcoming privilege claims must be attended by a statement setting forth the specific legal and factual basis for *each* privilege claim, with any disputes to be resolved by the ALJ's *in camera* inspection. On the record before us, it appears that Garden State had asserted, in essence, a "blanket" privilege claim with respect to the documents that are the subject of this Appeal.

3. Albeit, and after his *in camera* review, the ALJ granted Garden State's request for protection for some of the relevant documents, in whole or part, while holding that appellant had failed to support certain other claims with the specificity required to evince a valid privilege. So far as the record appears to us, the ALJ's treatment of these privilege claims was consistent with our holding in *LNJ Communications*, 3 FCC Rcd 2745, (Rev. Bd. 1988), where we stated that "documents for which a claim of attorney work product or attorney-client privilege are made should identified, and the basis for the claim of privilege for each document should be specified with particularity and sufficient precision to permit the Board to evaluate the merits of the claim." Nothing in Garden State's instant appeal persuades us that the ALJ's handling of appellant's privilege claims conflicts with *LNJ*; and appellant has not here further particularized any discrete instance, or any specific document, where the ALJ improperly denied a valid claim of privilege.[1]

4. Having identified no single error of law or abuse of discretion, we are bereft of any legitimate basis upon which to disturb the discovery ruling(s) below. *See Chronicle Broadcasting Co.*, 20 FCC 2d 728 (Rev. Bd. 1969) (ALJs are "delegated broad responsibility" for the conduct of orderly hearings and "to carefully manage" discovery procedures). It follows that, inasmuch as we can identify no reversible error in the ALJ's disposition of Garden State's broad privilege claims, its request for a stay is, in turn, moot.[2]

5. ACCORDINGLY, IT IS ORDERED, That the appeal filed September 5, 1989 by Garden State Broadcasting Limited Partnership IS DENIED, and its motion for stay filed September 12, 1989 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] As the courts have made abundantly clear, privilege is a limited exception in the law's vigorous search for all relevant evidence, and one to be strictly construed and carefully applied. *See, e.g., In re Sealed Case*, 676 F.2d 793, 806-807 (D.C. Cir. 1982).

[2] In a footnote, Garden State advises that it currently has pending a motion before the ALJ, requesting his immediate recusal from the case. It suggests that the Board defer action on its instant appeal, until the ALJ acts on its pregnant recusal motion. However, neither Garden State nor the Board can anticipate the ALJ's disposition of that recusal motion, or the status of the proceeding beyond his disposition. *See* 47 CFR §1.245(b)(2) and (b)(3). Hence, its footnote suggestion for deferral is both premature and presumptuous.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-137

In re Applications of

Roy E. Henderson d/b/a PUEBLO RADIO BROADCASTING SERVICE	File No. BPH-861002TA
SANCHEZ COMMUNICATIONS, INC.	File No. BPH-861002TB
HAL S. WIDSTEN	File No. BPH-861002TE
CLASSIC MEDIA, INC.	File No. BPH-861002TF
BUENA SUERTE BROADCASTING CORP.	File No. BPH-861002TG
O-V COMMUNICATIONS	File No. BPH-861002TH

For Construction Permit for a New
FM Station on Channel 248A
at Oro Valley, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1989; Released: October 10, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board are: (a) an Appeal, filed August 4, 1989, by Classic Media, Inc. (Classic) from the *Memorandum Opinion and Order*, FCC 89M-1999, released July 28, 1989, of Administrative Law Judge Richard L. Sippel (ALJ), dismissing its application; (b) a companion Petition for Waiver of Page Limitation, filed August 4, 1989; and (c) Oppositions thereto, filed August 11, 1989, by Sanchez Communications, Inc. and by the Commission's Mass Media Bureau, and by Pueblo Radio Broadcasting Services on August 16.

2. Shortly before the evidentiary hearing was to begin, and more than two years after the applications were filed, Classic was advised by the Bureau that its proposed antenna height was impermissible under the treaty "Agreement between the United States of America and the United Mexican States" ("Mexican Agreement"), 24 U.S.T. 1815, T.I.A.S. No. 7697. The Mexican Agreement imposes strict limitations on the power, height, and proximity of domestic FM stations to Mexican border areas.[1] Although Classic promptly sought leave to amend its application to specify a site previously approved by the Bureau, the ALJ rejected the amendment for lack of the requisite "good cause" showing. *See Pueblo Radio Broadcasting Service*, FCC 89M-960, released March 24, 1989. Whereafter, he granted a Petition to Dismiss filed against Classic, holding that no remaining purpose would be served by its further participation in this proceeding. From its dismissal, Classic appeals as a matter of right under 47 CFR §1.301(a)(2).

3. The ALJ's action is wholly consistent with *Kerrville Radio*, 2 FCC Rcd 3441 (1987), denying review of the dismissal of a similarly situated applicant. The Commission there expressly rejected the contention of the applicant that it should be permitted to amend to comply with the same Mexican Agreement. Rejecting a claim that adequate notice had not been given of the Mexican Agreement, the Commission, referencing both the "hard look" and "window" processing rules for new FM applications, *see Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, declared as follows:

> The limited amendment procedure, adopted after full notice and comment Rule Making, were [sic] adopted to provide service to the public quickly and efficiently. While it is desirable to have a number of qualified applicants from which to select a broadcast licensee, "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the institution of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n.7 (1985); *Star Signal Corporation*, 1 FCC Rcd at 406. *See also Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). Permitting [the applicants] to amend now would . . . undermin[e] the purpose of the new FM processing rules since it would inordinately delay new broadcast service to the respective communities and would be unfair to those applicants for these allotments who have filed acceptable proposals.

2 FCC Rcd at 3442-3443. *Accord, Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989); *Domega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989).

4. The only factual difference between those recent cases and this is that Classic's application was not summarily dismissed at the processing line stage. Due to administrative oversight and, perhaps, the like inattention of Classic's competitors, Classic's application slipped through. But the Bureau's improvidence is no grounds for treating Classic differently than the applicants in the above-cited cases, which cases the ALJ found controlling. *See generally also Reuters Ltd., v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986)(agency cannot depart from adherence to its own rules, even to achieve laudable aims). We are controlled as well by Commission rule and precedent.[2]

5. ACCORDINGLY, IT IS ORDERED, That the Appeal, and the Petition for Waiver of Page Limitation, filed August 4, 1989, by Classic Media, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Applications are "unacceptable for filing" if they fail to comply with international broadcasting agreements. *See 1010 Broadcasting*, 59 RR 2d 1124, 1125-1126 (1986).

[2] In this regard, and after the Bureau had improvidently designated its application for hearing, Classic paid the $6000 hearing fee. Whether or not this processing error may be grounds for remittance of the filing fee is a matter beyond this Board's purview. *See* 47 CFR § 0.231(c) (Managing Director is delegated authority for waiver or deferral of FCC filing fees).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-173

In re Applications of

COASTAL BROADCASTING PARTNERS A California Limited Partnership	File No. BPCT-851206KE
CATALINA 54 BROADCASTING, LTD., A California Limited Partnership	File No. BPCT-860207KJ
AVALON, CATALINA BROADCASTERS, INC.	File No. BPCT-860210KE
ES POSIBLE MINORITY MEDIA TELECOMMUNICATIONS, INC.	File No. BPCT-860210KH
CHRISTINE E. SHAW	File No. BPCT-860210KI
GOLDEN SHORES BROADCASTING, INC.	File No. BPCT-860210KJ
Patrick D. Sisneros d/b/a CATALINA BROADCASTERS	File No. BPCT-860210KK
ISLAND BROADCASTING LIMITED PARTNERSHIP, A California Limited Partnership	File No. BPCT-860210KM
AVALON BROADCASTING	File No. BPCT-860210KN
David H. Wagner d/b/a DHW COMMUNICATIONS	File No. BPCT-860210KO

For Construction Permit for a
New Television Broadcast Station at
Avalon, California

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 1989; Released: October 10, 1989

By the Review Board: MARINO(Chairman), BLUMENTHAL, and ESBENSEN

1. Before the Review Board are: (1) the *Initial Decision*, 4 FCC Rcd 2345 (1989) (I.D.), of Administrative Law Judge Edward Luton (ALJ); (2) the exceptions thereto filed by the above-captioned applicants; (3) the replies filed by all applicants (except Golden Shores Broadcasting, Inc., and Avalon Broadcasting); and (4) the hearing record below. Oral argument was heard on September 22, 1989.

2. In addition to the standard comparative issue,[1] the following basic qualifying issues were subsequently added by the ALJ with respect to Christine E. Shaw:

> To determine whether Christine E. Shaw is financially qualified to construct and operate her proposed station;
>
> To determine whether Christine E. Shaw was lacking in candor with the Commission, or engaged in misrepresentations of fact to the Commission, in certifying her financial qualifications; and,
>
> To determine in light of the evidence adduced pursuant to the foregoing issues, whether Christine E. Shaw is qualified to become a Commission licensee.

Shaw was determined by the ALJ to be unqualified pursuant to the foregoing financial issues. Based solely on comparative considerations, Es Possible Minority Media Telecommunications, Inc. was determined to be the preferred applicant (I.D., para. 216). However, upon our review of the record to date, we believe there are outstanding questions that require applicants Shaw and Es Possible to supplement the existing record before we can rule on the pending exceptions and resolve this proceeding.

3. *Shaw:* The ALJ determined that:

> In sum, Shaw's disregard for the financial standards imposed by the Commission on applicants for new facilities and her total abdication of responsibility for determining her ability to certify her financial qualifications require a finding that she is financially unqualified and that her certification was false at the time she filed her application. Shaw's direct case testimony and her evasiveness on cross-examination reveal a distinct lack of candor with respect to the basis for her financial certification and therefore require her disqualification under the certification issue as well.

I.D., para. 190. Nevertheless, the record before us at this juncture reveals that there are several lingering questions concerning the determination that Shaw was "financially unqualified" at the time she certified and filed her application. While Shaw apparently intended to rely solely upon her own personal assets to construct and initially operate her proposed facility, such a financing plan obviously is not improper. However, most of the assets she has

identified appear to be "non-liquid." It is established that "the Commission permits an applicant to rely on illiquid assets, such as real estate, where an applicant furnishes a relevant appraisal of the property. *Christian Children's Network, Inc.*, 101 FCC 2d 612, 614, para. 5 (1985)." *Opal Chadwell*, 4 FCC Rcd 1215, 1215-1216 (1989). Here, Shaw has relied upon the sale of certain stamps and coins, the value (and liquidity) of which are still open to question. Additionally, some questions remain as to the extent of Shaw's personal liabilities.[2]

4. Because Shaw was otherwise awarded 100% integration credit, enhanced by her past residence in the service area and her promised future residence in Avalon, in addition to enhancements for civic activities, broadcast experience, and female minority status (I.D., para. 191), she could be a close contender for the construction permit here (if found qualified). Rather than remanding this proceeding at this point, Shaw will be initially afforded an opportunity to supplement the record with certain additional financial data. *See, e.g., Opal Chadwell*, 2 FCC Rcd 2981 (Rev. Bd. 1987); *Order (Opal Chadwell)*, FCC 88I-045, released May 5, 1988; *Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1989). Shaw shall submit the following: (1) evidence of her financial condition (with pertinent financial statements) as of the date of certification of FCC Form 301 (clearly delineating liquid and non-liquid assets, as well as current and long-term liabilities); (2) appraisals of non-liquid assets relied upon; (3) evidence of her current financial condition in the same form ordered in (1) above; (4) evidence of any sums received by Shaw from the Wilshire Stamp Company (Wilshire) resulting from the auction (or purchase by Wilshire) of certain stamps and coins, and the basis for such receipts; and (5) a legible and true copy of the "Purchase Money Deed of Trust" dated February 13, 1986 (submitted into evidence as Catalina 54 Broadcasting Ltd., Exhibit No. 10), to which Shaw is a signatory.

5. *Es Possible*: The ALJ found that Rosemary Garcia is the sole voting shareholder of Es Possible. She intends to be general manager and work full-time at the facility, obtain a new residence in Avalon, and "live there much of the time." Garcia also claims that she has no plans to move from Avalon at any point in the future (I.D., paras. 59-60, 66).

6. However, the record reveals that Garcia is an officer, director, and 50% shareholder of three corporations, as well as the owner of "one proprietorship," all four of which are McDonald's Restaurant franchisees (I.D., para. 72). Garcia claims that if Es Possible is the successful applicant here, she "will turn over her day-to-day responsibilities for the four [McDonalds' Restaurants] to others." More specifically, Garcia stated at hearing that she has already reduced her time commitments to these restaurants to under 25 hours per week by turning over most of her responsibilities to her daughter, and will further reduce her duties so that she can devote "full-time" to the proposed television station (I.D., para. 73).

7. The Board was recently confronted with a similar factual situation in *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (Rev. Bd. 1988), where a 45% shareholder, who was also a McDonalds' franchisee, claimed full-time integration credit at the new television broadcast facility proposed therein. We noted that that *Washoe* applicant principal was "bound by the clearest terms of his written franchise agreement with McDonalds, which agreements specifically require [him] to devote his fulltime efforts to the restaurant." *Id.*, at 3952. We there specifically quoted the "standard" McDonalds' License Agreement (which that principal had personally executed), noting that the Agreement required him to "diligently and fully exploit his rights in this license by personally devoting his best efforts and . . . shall devote his fulltime and best efforts to the operation of the Restaurant." *Id.* Because of the evident conflict in commitments, the Board was unable to credit that principal's promise to "integrate" full-time into the operation of the proposed VHF television facility.

8. In light of the foregoing, similar concerns are unavoidable with respect to Garcia here. Therefore, Es Possible shall furnish true and correct copies of any license agreements entered into by Garcia herself, as well as her corporate entities, and McDonalds Restaurants.[3]

9. ACCORDINGLY, IT IS ORDERED, That Christine E. Shaw and Es Possible Minority Media Telecommunications, Inc., SHALL FILE the documents ordered herein within twenty (20) days of the release date of this *Order*; and,

10. IT IS FURTHER ORDERED, That the competing applicants herein SHALL BE AFFORDED an opportunity to respond and/or comment with respect thereto within ten (10) days of the date of the filing of the respective documents.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] An "air hazard" issue was also originally specified with respect to several applicants; however, all such questions were resolved favorably prior to issuance of the I.D. as to all applicants except Shaw. In his I.D., the ALJ ultimately resolved the "air hazard" issue in favor of Shaw (I.D., para. 177).

[2] The ALJ observed: "As the record shows, Shaw in fact is the signatory to a $1.9 million deed of trust or property in which she owns a 10% interest" (I.D., para. 180). A copy of this "Deed of Trust" was submitted into evidence by Catalina 54 Broadcasting, Inc. However, the copy supplied is virtually unreadable (as Shaw's counsel concedes).

[3] These documents are not presently part of the record, and thus were not available to the ALJ in his evaluation of the Es Possible proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CANNON COMMUNICATIONS CORPORATION Chatham, Massachusetts	**MM DOCKET NO. 83-976** File No. BPH-811102AH
FIRST CLASS COMMUNICATIONS, LTD. Chatham, Massachusetts	**MM DOCKET NO. 83-982** File No. BPH-820624AX
HEATHER H. STENGEL Chatham, Massachusetts	**MM DOCKET NO. 83-983** File No. BPH-820624AZ

For Construction Permit
for a New FM Station

Appearances

Thomas W. Davidson, Esquire, Mark Schneider, Esquire, and *Margaret Toby, Esquire,* on behalf of Cannon Communications Corporation; *John J. McVeigh, Esquire,* on behalf of Steven Callahan; *Donald E. Ward, Esquire,* and *Edward S. O'Neill, Esquire,* on behalf of First Class Communications, Ltd.; *James K. Edmundson, Esquire,* on behalf of John W. Miller; and *Jerry Hermele, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: October 3, 1989; Released: October 12, 1989

PRELIMINARY STATEMENT

1. This proceeding is before the Presiding Judge on remand for the preparation of a Supplemental Initial Decision. *See, Memorandum Opinion and Order,* FCC 88-215, released July 11, 1988, at p. 2 (*Remand Order*). The remand follows the Commission's May 1986 Order affirming a Review Board Decision of July 30, 1985 (101 FCC 2d 169). The Review Board's decision granted the application of Joseph A. Ryan (Ryan) for a construction permit for a new FM station at Chatham, Massachusetts, and denied, *inter alia,* the competing applications of Cannon Communications Corporation (Cannon) and Heather Stengel (Stengel).

2. On August 26, 1986, Ryan filed with the Commission an application to modify his construction permit to correct the geographic coordinates of his proposed transmitter site. (Joint Ex. R-2.) The modification application appeared on Public Notice of September 4, 1986. (Joint Ex. R-3, Att. A.) On October 1, 1986 (the date on which their initial briefs were due to be filed in the Court of Appeals), Cannon and HBZ Communications (a since dismissed applicant) jointly filed with the Court a "Motion for Remand." (Joint Ex. R-3.) The motion was predicated upon their contention that Ryan's modification application was in reality an application to change transmitter sites, raising a question as to whether he had reasonable assurance of the availability of his originally specified site.[1] The modification application was granted by the Commission on December 12, 1986. Pursuant to Commission consent, Ryan assigned his construction permit to First Class Communications, Ltd. (FCCL), his wholly-owned corporation, in March 1987.

3. Ryan opposed the "Motion for Remand" on October 10, 1986. Therein, he pointed out that his 1982 application had made specific reference to the Town of Brewster site on which he intended to build his station; that prior to filing his initial application, he had obtained a letter dated June 21, 1982, from the Brewster Industrial Development Financing Authority, stating its willingness to lease that site to him for the proposed tower and building; that he had always intended to locate his facilities at that site; and that a survey made following the Commission's grant of his application in May 1986, revealed to him for the first time that the coordinates specified in his 1982 application mistakenly identified a location several hundred feet to the east of his intended site. The Commission's General Counsel also opposed the "Motion for Remand," characterizing Ryan's August 1986 modification application as "entirely routine." (Joint Ex. R-5.) By Opinion filed August 11, 1987, the Court of Appeals denied the "Motion for Remand" as "entirely without merit." (Joint Ex. R-7.)

4. Almost one year after the Court of Appeals denied the first "Motion for Remand," Steven Callahan, a former employee of Ryan, approached Cannon and alleged facts that indicated that Ryan had misrepresented and lacked candor before the Commission and the Court of Appeals concerning his site modification. Callahan's October 2, 1987, affidavit asserted broadly that Ryan had misrepresented to the Commission and the Court his original transmitter site intentions, in that Ryan had originally, and at the time he received his construction permit, intended his site to be where the 1982 application coordinates had placed it. Callahan also alleged that he and another Ryan employee, John Miller, had been promised equity interests in the station by Ryan in exchange for their services in building and operating the station. Callahan met with counsel for Cannon on three separate days and had numerous telephone conversations with them. On the basis of these continuing contacts, several drafts of an affidavit were prepared for Callahan by Cannon's counsel, culminating in a final version which Callahan executed and had notarized on October 2, 1987.[2] (Cannon Ex. R-1.)

5. Shortly after the Callahan affidavit was delivered to her home on the morning of October 5, 1987, Ms. Landy appeared at the studios of Station WFCC and requested to see Ryan. They met in his office for approximately 20-25 minutes, during which time she showed him Callahan's affidavit (consisting of 18 pages of text, and seven attachments comprising ten pages). The facts relating to this meeting will be set forth in the findings. In any event, on October 20, 1987, Cannon filed the Callahan affidavit along with a "Motion for Remand" and "Petition to Reopen the Record and Enlarge Issues Pertaining to Joseph A. Ryan" (the Motion and Petition). (Joint Ex. 8.) The

FCC's Office of General Counsel supported Cannon's Motion and Petition, and the Court of Appeals remanded the proceeding to the Commission. (Joint Ex. R-13.) Thereafter, the Commission remanded the proceeding to the Presiding Judge for the adduction of evidence and the issuance of a Supplemental Initial Decision on the following issues:

> (A) To determine whether Ryan misrepresented to and/or concealed from the Commission, in his application to modify his construction permit filed with the Commission on August 26, 1986, the reasons for and the circumstances surrounding his request to modify his construction permit;
>
> (B) To determine whether Ryan offered equity interests in his station to other individuals in conflict with his previous representation to the Commission that he would be the sole owner of the station;
>
> (C) To determine, in light of the evidence adduced pursuant to issues A and B, whether Ryan is basically qualified to be a Commission licensee; and
>
> (D) To determine whether Lynn Landy, principal owner of Cannon, attempted to obtain an equity interest in Ryan's station by improper means, and, if so, whether Cannon is basically qualified to be a Commission licensee.
>
> (*Remand Order*, *supra*, at p. 2.)[3]

6. A prehearing conference was held on September 1, 1988. Hearings on the remanded issues were held on January 23, 24, 25, 26, 27, and 30, 1989. The record was closed on January 30, 1989. The applicants submitted their proposed findings of fact and conclusions of law on April 11, 1989. Reply findings were filed by FCCL and Cannon on May 2, 1989.

FINDINGS OF FACT

JOSEPH RYAN - (FIRST CLASS COMMUNICATIONS, LTD.)

Preparation of Ryan's 1982 Application

7. Ryan filed his application on June 24, 1982. On June 17, 1982, Ryan retained Harry Seabrooke of Silliman and Silliman as his consulting engineer. (Tr. 1704, 1707-1708.) On the next day, June 18, 1982, Ryan obtained three different USGS topographic maps of the Chatham area, including the Harwich topographic map, to assist him in locating an acceptable tower site for his proposed station. (Tr. 1861.) Ryan also obtained topographic maps for the Orleans and Chatham quadrangles. (*Id.*) During the weekend of June 19 and 20, 1982, Ryan traveled to Chatham to evaluate possible tower sites, visiting sites to which Seabrooke directed him and physically inspecting their condition to determine their acceptability. (Tr. 1710-1715, 1862-1863; Cannon Ex. R-20.) On June 20, 1982, four days before the filing deadline, Seabrooke directed Ryan to the Freeman's Way area in the Town of Brewster. (Tr. 1716-1717, 1862, 1867; FCCL Ex. R-2A, p. 11.) Ryan, accompanied by his wife, inspected this area on June 20, 1982.

8. The following morning (June 21, 1982), Ryan went to the Brewster assessor's office for the purpose of determining the ownership of the land along Freeman's Way. He ascertained that there were several privately owned lots in the area located to the right (east) of an unpaved road leading to the north from Freeman's Way to a gravel pit (which will hereafter be referred to as the "Gravel Pit Road"), plus a large industrial park to the left (west) of the Gravel Pit Road owned by the Town of Brewster and administered by the Brewster Industrial Development Financing Authority. (Tr. 1877, 1881, 1935-1936; FCCL Ex. R-2A, p. 11.)

9. Ryan then went to the offices of the Financing Authority and was advised that a site in its industrial park was available for lease. He conveyed this information to Seabrooke who advised him that the Town's site would meet his objectives. Ryan then called his communications attorney, Donald E. Ward, who advised him to get a letter from the Financing Authority confirming the availability of the site. (FCCL Ex. R-2A, pp. 11-12.) Ryan returned to the offices of the Authority and was given a letter dated June 21, 1982, from Milton B. Shaw, the Chairman of the Financing Authority, confirming the site availability. (FCCL Ex. R-2A, p. 12.) The letter stated as follows:

> The Brewster Industrial Development Financing Authority is prepared to lease you a suitable parcel of land for the erection of a radio tower and operations building.
>
> Please do not hesitate to contact us for any additional information you may require.
>
> (FCCL Ex. R-2A, Att. G (p. 33).)

10. Ryan then recontacted Seabrooke and Ward and confirmed that he had obtained the Town's assurance of the availability of the site. (FCCL Ex. R-2A, p. 12.) He told Seabrooke that the site he had secured was on publicly held land to the left of the Gravel Pit Road. (Tr. 1936-1937.) On the basis of his understanding of Ryan's description of the site, Seabrooke then prepared the engineering portion of the application. (FCCL Ex. R-3A.) In pinpointing the site, Seabrooke relied exclusively on Ryan to designate the precise site based on features on a topographic map of the area which both Ryan and Seabrooke worked from. Seabrooke conducted no independent survey to assure himself that he had accurately ascertained the exact site Ryan intended to use. (Tr. 1739-1740.) In the textual portion of his engineering statement, Seabrooke described the proposed site as follows:

> The proposed location is within the Brewster Industrial Park which contains approximately 100 acres zoned for this and similar industrial uses. It will be necessary to clear some trees and underbrush for the tower base, transmitter building, guy anchors and the guy routes from the tower to each of the three guy anchors. There is presently a roadway into the site from Freeman's Way which may have to be modified some slight amount to reach the actual site of the tower.

* * *

> The Brewster Industrial Park Development Finance Authority has issued a letter of consent to lease the proposed site to the applicant. The proposed construction has not been the source of any local controversy on an environmental basis.
>
> (Joint Ex. R-1, p. 8.)

However, in plotting the site, Seabrooke placed the site to the east of the Gravel Pit Road on the topographic map accompanying the application, and derived the coordinates (North Latitude 41^0, 44', 12", West Longitude 70^0, 00', 31") for Ryan's intended site on the basis of that placement. The coordinates placed the site on privately owned land, not on the public land for which Ryan had obtained a letter acknowledging its availability as a transmitter site. (FCCL Ex. R-15, p. 1.)

11. The completed engineering exhibit was delivered to Ward's office where it was reviewed by Ryan prior to the filing of the application. Although Ryan's review included the topographical map which was part of the exhibit, he did not notice that the site was incorrectly plotted. (Tr. 2057-2058.)

Ryan's 1986 Site Modification Application

12. Ryan's application, which was filed on June 24, 1982, was granted by Commission action on May 15, 1986, when an application for review of the Review Board decision was denied. (*See, Order*, FCC 86-244).[4] During the four years his application was pending and being prosecuted, nothing occurred which alerted, or might have alerted, Ryan to the fact that the site coordinates specified in his application were not those of the Town of Brewster site which he intended to use, and which he believed he had specified. Following the Commission's May 15, 1986, grant of his application, Ryan visited the Town of Brewster to secure a formal lease for the site he intended to use for his station. Thus, on May 23, 1986, Ryan met with Barbara Vaughn, Brewster Town Clerk and a member of the Brewster Financing Authority. Ryan advised her that he had been awarded the construction permit, and that he wished to enter into a formal lease of the site, consistent with Mr. Shaw's letter of June 21, 1982. (FCCL Ex. R-2A, p. 9.)

13. Ms. Vaughn gave Ryan a map of the Town of Brewster's Freeman's Way Industrial Park on which the area set aside by the Town for his radio tower had been outlined, and suggested that he contact Albion G. (Peter) Hart, a surveyor who had been retained by the Town for the purpose of defining the precise boundaries of the Ryan site. (Tr. 1896-1897.) She also scheduled an appointment for Ryan with the Financing Authority for the morning of June 16, 1986. (FCCL Ex. R-2A, p. 10.) Mr. Ryan's notes of the meeting with Ms. Vaughn were as follows:

> She showed me map of "*Freeman's* Way Industrial Park" and the area they had set aside for Tower. (*Didn't appear to be area - I thought it was placed by H.S. [Harry Seabrook] in adjacent "Brewster Industrial Park". "Freeman's Way Industrial Park" didn't exist in 1982. She said "Brewster Industrial Park" was privately owned).
>
> (Cannon Ex. R-21, p. 2.)

14. Ryan was surprised by the reference to "Freeman's Way Industrial Park." When he selected his site in 1982, it was simply called the "Brewster Industrial Park." The designation of the Town land as "Freeman's Way Industrial Park" occurred during the period between 1982 and 1986. After meeting with Ms. Vaughn, Ryan visited the transmitter site and saw, for the first time, a sign with the designation "Freeman's Way Industrial Park." Ryan was somewhat confused by the change and/or difference in the designation of the two industrial parks. (Tr. 1899.) Ryan was not sure what his notes meant as he was confused by the designation of "Freeman's Way Industrial Park" and "Brewster Industrial Park," because these two designations did not exist in 1982 when he selected his site. (Tr. 1900.) He was confused because his site was to the left of the Gravel Pit Road in the Brewster Industrial Park, but in 1986 the area to the left of the Gravel Pit Road was identified as Freeman's Way Industrial Park. (Tr. 1901.)

15. Ryan met with Mr. Hart on June 4, 1986, and told Hart that he "was planning to construct a radio tower on land owned by the Town of Brewster." Ryan was actively negotiating lease terms for the public land, and Hart had been requested by the Brewster Industrial Development Financing Authority . . . to define the boundaries of a parcel in the Town's land for Mr. Ryan's transmitter site. (FCCL Ex. R-15, p. 1.) Ryan asked Hart to pinpoint his site coordinates, as specified in his application, on the Town property which he intended to use. On June 11, 1986, Hart supplied Ryan with three copies of a map[5] upon which those coordinates were marked. (Tr. 1842; FCCL Ex. R-15.) The coordinates did not fall on Town property, but rather fell upon private land some 350 feet east of the eastern boundary of the Town's property.[6] (FCCL Ex. R-2A, p. 10.)

16. As soon as Ryan discovered from Hart that the coordinates specified in his application were not on Town property, he communicated that information to Seabrooke, his consulting engineer, and Ward, his legal counsel, sending each of them one of the Hart Maps on which Ryan had made certain annotations in red. (Tr. 1842; FCCL Ex. R-2B.) Ryan requested their advice as to what had to be done. (FCCL Ex. R-2A, pp. 14-15.) However, he had not received that advice by June 16, 1986, the date when a meeting with the Financing Authority was scheduled. (Tr. 1927; FCCL Ex. R-2A, p. 13.) The meeting was not convened on June 16, 1986, because two of the members of the Authority were absent. (Tr. 1827-1828; FCCL Ex. R-2A, p. 10.) Also on June 16, 1986, Ryan met with Steven Callahan and showed him the tower site. (FCCL Ex. R-2A, p. 13.) Ryan and Callahan are in disagreement as to which exact "site" they inspected and as to some of the events of that day.

17. Callahan was hired by Ryan to assist in constructing the station. Callahan was recommended to Ryan by John Crohan, a friend of Ryan's. (Tr. 1911; Cannon Ex. R-1, p. 1.) Prior to the meeting on June 16, 1986, Ryan and Callahan had met only once, conversed several times, and exchanged several letters between May 20, 1986, and June 9, 1986. (Tr. 1911-1915.)

18. Both Callahan and Ryan agree that on the morning of June 16, 1986, they had breakfast at a coffee shop in Orleans. (Tr. 1248-1249.) Then, according to Callahan, they went to Mr. Ryan's home and spent several hours during which Ryan showed him his original engineering, the June 21, 1982, letter from Milton Shaw, and an assessor's plat map of the Freeman's Way area (hereinafter referred to as the "Assessor's Map"). This map had its origins in the Brewster assessor's offices, and shows the boundaries of particular parcels on the north side of Freeman's Way. The largest parcel thereon is lot 41, and the "Town of Brewster" is shown as its owner. The ownership of the remaining parcels is not shown on the map. According to Callahan, the only markings on the map was a question mark placed thereon by Ryan on the lot numbered 71, below lot 35 and to the right of the Gravel Pit Road. (Tr. 1251-1252.) Callahan claimed this Assessor's Map (Cannon Ex. R-1, Att. 5 (p. 30)) was the only map or document supplied to him by Ryan on that date. (Tr. 1254-1255.) He and Ryan then drove to Chatham, and during the drive Ryan described the 1982 site selection process. (Tr. 1380; Cannon Ex. R-1, p. 6.) According to Callahan's October 1987 affidavit, Ryan told Callahan that in 1982 he had inspected several sites in the area which Seabrooke recommended based upon his review of the topographical maps, and that Seabrooke had directed Ryan to the land on the right side of Gravel Pit Road (private land) because that was the point of highest elevation in the area.[7] Ryan then drove by the land; selected the point of highest elevation on the private land; and, approximately two days before filing his application, specified that point as his site location. (Cannon Ex. R-1, pp. 6-7.) According to Callahan, Ryan also mentioned having obtained reasonable assurance of the site's availability from Milton Shaw, then Chairman of the Brewster Industrial Park Board (Tr. 1381).[8]

19. Callahan and Ryan drove to the Freeman's Way area. According to Callahan, they entered upon and physically inspected the private land (*i.e.*, to the east of the Gravel Pit Road) in search of the highest point of elevation thereon. When they located that point, Callahan inquired how Ryan was going to acquire the right to utilize the land, and, according to Callahan, Ryan responded that Callahan should determine how much land was needed, and Ryan would take care of acquiring it. (Cannon Ex. R-1, p. 7.) At the time they inspected the site, Ryan did not know whether he would be permitted to build his station on the Town of Brewster site which he had intended, or whether he would be forced to construct at the site specified by the erroneous coordinates in his application. (Tr. 1940.)

20. According to Callahan, Ryan gave him a copy of the Assessor's Map when they parked at the site, and then placed a question mark on it to indicate the approximate place on the private land which he had proposed in his application and upon which he then intended to construct his tower. (Tr. 1564-1565; Cannon Ex. R-1, pp. 5-6, and Att. 5 (p. 30).) Callahan asserts that the map contained no other markings when Ryan gave it to him on June 16, 1986, but that some six weeks later, on July 24, 1986, Ryan took the map and marked off the area (in the public land) upon which he intended to locate his new site; wrote the word "PRIVATE" on the east side of the boundary of the Town's land; and circled the word "TOWN" on lot 41. (Cannon Ex. R-1, 11.) Hence, the map which Callahan produced as Attachment 5 to his October 1987 affidavit clearly delineates the outline of Ryan's site on the Town's land which, according to Callahan, was not a subject of discussion on the day (June 16, 1986) Ryan gave him the map.

21. According to Callahan, Ryan first acknowledged to him that a mistake had been made on June 24, 1986, when he asked Callahan to call Mr. Hart. (Tr. 1399-1400.) Callahan claimed that the purpose of the call was to request Hart to conduct an initial survey of the "new site" on public land. (Tr. 1403.) But it appears that Ryan himself contacted Hart on June 4, 1986, to conduct a survey to locate the application coordinates on the public land. It also appears that Hart had delivered the survey showing that the coordinates specified in Ryan's original application were not on public land on June 11, 1986, five days prior to Callahan's June 16, 1986, meeting with Ryan. (Cannon Ex. R-22.) However, according to Callahan, Ryan first made reference to a "mistake" on June 24, 1986, but did not explain the nature of the "mistake," or when he had learned of it, and it was not until a month later, on July 24, 1986, that he told Callahan that the application coordinates lay on private land. (Tr. 1422-1423, 1567.)

22. Ryan's version of what transpired on June 16, 1986, differs from Callahan's. Ryan confirmed that they began the day with breakfast in Orleans. However, according to Ryan, the focus of their discussion at that point was reviewing a list of items which Ryan had prepared for discussion at the planned meeting with the Brewster Industrial Development Authority later that morning.[9] (Tr. 1826-1827.) Callahan does not recall such meeting having been mentioned. (Tr. 1377.) At about 9:45 a.m., Ryan attempted to call Ms. Vaughn from a pay phone near the restaurant to confirm their meeting, but he was told that she was not in. He and Callahan then drove to the Brewster Town Hall, where he attempted to locate Messrs. Hopkins and Shaw, the other members of the Authority, but without success. (Tr. 1827-1828.) He and Callahan then drove to the Freeman's Way site, and Ryan showed Callahan his remaining copy of the Hart Map (which had not been marked or annotated by Ryan, as those which he sent to Seabrooke and Ward had been). (Tr. 1828-1829, 1842.) Ryan pointed out to Callahan the Hart Map's portrayal of Ryan's 1982 coordinates and explained their background. (Tr. 1842.) They then walked into the site, with Callahan in the lead.[10] After Ryan had proceeded 20-30 yards, Callahan suggested that Ryan wait while he (Callahan) proceeded another 200 yards or so into the site.[11] Callahan returned after 10-15 minutes, and they drove back to Orleans to pick up Callahan's car; Callahan then followed Ryan to his home, arriving about noon. (Tr. 1830.)

23. Ryan and Callahan then reviewed other matters pertaining to the proposed station and its construction. As reflected in Ryan's contemporaneous notes of that meeting (FCCL Ex. R-2D, p. 2), they discussed the FCC's requirements as to an operating station's engineering personnel; the duties of a station engineer; whether there would be a change in equipment as a result of having a shorter tower than originally proposed[12]; and radiation standards. According to Ryan, he supplied Callahan with several documents prior to Callahan's departure that day: (1) a xerox copy of that portion of the Hart Map covering the proposed transmitter site; (2) a copy of Ryan's 1982 application and its engineering exhibit; (3) a copy of the June 21, 1982, letter from Milton Shaw; and (4) a copy

the Assessor's Map. (Tr. 1843.). According to Ryan, on the Assessor's Map, he had marked not only the question mark on the private land to the east of the Gravel Pit Road, but also the outline of the intended site on the Town property to the west of the road. (FCCL Ex. R-2A, p. 10.)

24. On June 24, 1986, Callahan called Peter Hart, at Ryan's request, and told him that Ryan would be moving his transmitter to the left (west) of the Gravel Pit Road. (Tr. 1399, 1403.) According to Callahan, Hart did not manifest any familiarity with what Callahan was calling him about, but said that he and Hart understood that the tower site was to be on the left side of the Gravel Pit Road. (Tr. 1403, 1408.) Later that day, Callahan wrote the following letter, dated June 24, 1986, to Hart:

> It was a pleasure talking to you today about the proposed tower project for Joe Ryan off Freeman's Way. I've enclosed a rough diagram of the tower base placement, guy wire positioning, and the necessary area to be cleared to accomplish our goals. I've also sketched in a driveway from the proposed 40 foot road to the building we'll be placing at the base of the tower. As you can see, the actual area to be cleared would be three 10 foot by 200 foot strips and the driveway.
>
> As I mentioned, Joe will be needing the total amount of acreage needed for the tower for an application with the town's Development Authority. If you can call him with that figure, I would appreciate it. I believe he will then need a drawn plat with tower and guy placement indicated. Joe will be delivering to you a topo map which will need the exact tower placement point as we are making a slight change and have to recompute our maximum tower height for the F.C.C. You can return this to Joe and he will send it immediately to our Washington consultant.
>
> Thanks for your help and assistance and please feel free to contact me if you have any questions.
>
> (FCCL Ex. R-2C.)

25. Callahan explained his use of the words "slight change" in his June 24, 1986, letter because the move was just "across the street" ...a slight "distance change.... It wasn't very far at all." (Tr. 1554.)

26. Ryan received from Callahan a copy of his June 24, 1986, letter to Hart, including its enclosure. (Tr. 1821-1822; FCCL Ex. R-2C.) That enclosure was fully consistent with Callahan's description of it in his covering letter. The enclosed "rough diagram" as received by Ryan was on a base map copied from a portion of one of the maps provided to Ryan by Hart on June 11, 1986 -- consisting of that portion of the Hart Map upon which Hart had drawn contour lines depicting height above mean sea level at ten foot intervals; *i.e.*, in the southeast corner of the Town's industrial park, where Ryan's tower was to be (and now is) located. Ryan had supplied Callahan with a copy of the Hart Map during their meeting of June 16, 1986. (Tr. 1843.)

27. Callahan, however, denies that such enclosure was prepared by him, claiming: "If I had received a very, very accurate topographical map such as this, I would have spent more time drawing and laying out the antenna array than I did." (Tr. 1265.) He went on to claim that he had no recollection of "having this information available to me in the way of topographic data. That was something that I indicated in my letter, that Mr. Hart could be getting from Mr. Ryan at a very, very later date. If I had that topographic data available, I wouldn't ask Mr. Hart to reget [*sic*: read "expect"] that topographical data from Mr. Ryan, he would already have it." (Tr. 1266.)

28. In fact, Callahan's letter advised Mr. Hart that Ryan would be delivering "a topo *map* which will need the exact tower placement" (emphasis added) in connection with a "slight change" to be filed with the FCC -- not "topographic data." Callahan admitted that he understood that any filing with the FCC would have to be accompanied by a 7 $1/2^0$ or 15^0 topographic map, but he denied that he understood that Ryan would be delivering such a map to Mr. Hart, and denied that he understood that the purpose of Mr. Ryan's doing so (and having Mr. Hart place the tower location thereon) was for Ryan's application (Tr. 1267-1268) -- despite the clear language of his June 24, 1986, letter.[13]

29. According to Callahan, on July 24, 1986, Ryan explained to Callahan the error he had made in specifying his site. (Tr. 1413; Cannon Ex. R-1, p. 11.) Prior to a hearing at the Brewster Water Quality Control Board, on the plat map (Assessor's Map) Ryan had provided to Callahan during the June 16, 1986, meeting, Ryan explained the mistake that had been made in originally specifying coordinates that fell on land to the right (or east) of the Gravel Pit Road. Ryan, according to Callahan, explained the different ownership of the two sites, that the land on the left of the Gravel Pit Road was Town land while the land on the right of the Gravel Pit Road was private land. (Tr. 1415, 1422-1423; Cannon Ex. R-1, p. 11.) Ryan wrote the word "PRIVATE" in large letters on the border of the Brewster Industrial Park on the plat map, and circled the word "TOWN" on the plat map to indicate the different ownership of the industrial parks. (Tr. 1918-1920; *Id.*) While Ryan acknowledged placing these notations on the map, he was uncertain exactly when he made the notations. (Tr. 1918-1920.)

30. Several times in July and August of 1986, Ryan told Callahan that he was concerned that he might be vulnerable and suffer a fate similar to Heather Stengel had before him because of his erroneous site coordinates. (Tr. 1987; Cannon Ex. R-1, p. 12.) Ryan knew that Stengel had been disqualified because of problems with her transmitter site. Stengel apparently was confused as to her site and did not have sufficient documentation regarding her site; she did not "nail down" her site and did not have the necessary reasonable assurance. (Tr. 1982-1983; FCCL Ex. R-2A, p. 16; Cannon Ex. R-1, p. 12.) Ryan was concerned that Stengel's site problems could be analogized to his own erroneous site coordinates and expressed this concern to Callahan. (Tr. 1987.) Ryan recognized that Ms. Landy might seek to analogize his erroneous site coordinates problem to Stengel's problem which resulted in her disqualification. (Tr. 1984.)

31. In August of 1986, Ryan attempted to reconstruct the events surrounding the location and specification in 1982 of his transmitter site and the "screw up" regarding the erroneous site coordinates specified in his application. (Tr. 1979.) He revisited the Freeman's Way area and spoke to Town officials in an effort to determine why the site coordinates in his application did not fall on the Town's property. (Cannon Ex. R-23.) After revisiting the

Freeman's Way area and speaking with Town officials, Ryan wrote a detailed, three-page letter to his counsel (Ward and Mendelson, P.C.) reconstructing his activities in 1982 and the reasons he believed the application specified the wrong site. (Tr. 1979; Cannon Ex. R-23.)

32. On August 14, 1986, Seabrooke sent Ryan a draft of the modification application that was subsequently filed on August 26, 1986. (Cannon Ex. R-18.) Seabrooke's cover letter, which was addressed to Ryan's FCC counsel with a copy to Ryan, stated, "Please read this carefully and if there is any part of it that you do not think will fly, let us know and we shall be happy to make any changes you feel are necessary." (*Id.*) Seabrooke indicated that his concern over whether or not "any part" of the application would "fly" related to the short-spacing issue, and not the explanation of the reason for the change of the site specification. The modification application stated that a spacing check had been made. (Joint Ex. R-2, p. 16.) Seabrooke's concern was that the modification application was to be filed at a time when the FCC was converting spacing requirements from the English system to the metric system, and the change did not comply with the metric system spacing to the nearest kilometer. (Tr. 1791.) Thus, Seabrooke was concerned that the change would result in a short spacing. Because counsel was the legal authority representing Ryan, Seabrooke raised the matter with counsel so he could deal with it in the context of whether the change would be accepted by the FCC or whether a waiver request would be necessary. (Tr. 1792.)

33. On August 26, 1986, Ryan filed with the FCC his application to modify his construction permit and stated as follows the reasons for the application:

> This modification is to make a minor correction to the geographic coordinates and to the ground elevation at the base of the tower which results from the final survey of the proposed site as required by the town of Brewster prior to settlement of the final lease agreement. The elevation of the final site is slightly different from that shown in the original application. Therefore, the tower height is being adjusted three (3) feet in order to maintain the same antenna height above average terrain and the same height above mean sea level of the antenna structure.
>
> (Joint Ex. R-2, p. 16.)

No further explanation of the facts surrounding the change in coordinates, tower height, or antenna was given. (*Id.*) With regard to spacing, the following was stated:

> A spacing check has been made to ascertain that the proposed correction of geographic coordinates does comply with the pertinent spacing requirements of Section 73.207 of the FCC's Rules. . .
>
> (Joint Ex. R-2, p. 16.)

34. Ryan's application, prior to the August 26, 1986, site modification, specified the following coordinates:

> North Latitude: 41^0, 44', 12" West Longitude: 70^0, 00', 31"
>
> (Joint Ex. R-1, p. 2.)

The modification application filed by Ryan on August 26, 1986, specified the following coordinates:

> North Latitude: 41^0, 44', 13.7" West Longitude: 70^0, 00', 40.3"
>
> (Joint Ex. R-2, p. 11.)

The transmitter location was described in the original application as "North side of Freeman's Way, 0.3 miles west of Route 39" and on the modification application it was described as "North side of Freeman's Way, 0.7 km (0.45 miles) west of Route 39." The information as to state, county and city or town was the same on both applications. (Joint Ex. R-1, p. 3; Joint Ex. R-2, 12.)

35. As noted, Seabrooke characterized the modification as a "minor correction" to the geographic coordinates. According to Seabrooke, he considered the modification minor because the change in coordinates was less than one minute. This was less than one mile; anything over one mile would not be considered a minor change by Seabrooke. (Tr. 1789.) The site identified by the coordinates in the modification application was about 750 feet from the site coordinates in the original application. A distance of about 350 feet separated the site coordinates specified in the original application from the eastern boundary of the town property upon which Ryan said he intended to build his station. (FCCL Ex. R-2A, p. 10.)

36. The modification application, as noted, was filed with the Commission on August 26, 1986. Prior to the filing of the application, Callahan and Seabrooke had a conversation regarding a possible short spacing problem involving WAAF, Worcester, Massachusetts, located to the northwest of the Brewster area. It was Callahan's belief that the new coordinates were potentially short spaced to station WAAF. (Tr. 1446.) On September 9, 1986, Callahan met with Ryan at Ryan's home. He reviewed the application at that time and, according to Callahan, stated to Ryan that it was "overly creative." Callahan characterized the application in this way because of the manner in which the short spacing matter was treated as well as the reasons stated for the change in site coordinates. (Tr. 1444-1446.) According to Callahan, while he had these concerns, he deferred to the legal and engineering judgment of the two professionals and never raised with Seabrooke or Ward his concern that the application should have addressed short spacing.[14] (Tr. 1448-1449.)

37. According to Callahan, he was "surprised" and "shocked" that he hadn't been invited to put his "two cents' worth" into the preparation of the modification application. (Tr. 1450.) Ryan sent Callahan a copy of Seabrooke's engineering for the modification application together with a copy of the unexecuted non-engineering portions of the modification application shortly after their receipt from Seabrooke and Ward in mid-August, and Ryan did not execute them until August 22, so that he could receive Callahan's comments. (Tr. 1848-1849.) Callahan had in his files copies of portions of the unexecuted modification application. (Tr. 1450-1453;

FCCL Ex. R-9, p. 2.) Callahan claims that he received these from Ryan *after* he had been shown a copy of the executed application on September 9, 1986, but Ryan, as noted, stated that he sent a copy of the modification application before it was filed. (Tr. 1454.) Ryan recalls receiving no comments from Callahan, either in August or later, and denies that Callahan ever told him that the August 1986 application was "overly creative" or otherwise inadequate. (Tr. 1849-1850.)

38. After spotting an FCC public notice disclosing that the modification application had been filed, Cannon and HBZ investigated the difference between the coordinates and locations of the sites specified by Ryan in 1982 and 1986. (Joint Ex. R-3.) After their discovery that the coordinates and locations were on different parcels of land owned by different owners, Cannon and HBZ moved the Court of Appeals to remand the proceeding for an investigation of the coordinate correction. (*Id.*) Specifically, in a "Motion for Remand" filed with the Court of Appeals on October 1, 1986, Cannon and HBZ alleged that Ryan's August 26, 1986, modification application stated:

> . . . specifying a new transmitter site . . . raises serious questions about the validity of the Commission's original award to Ryan. The new transmitter site is clearly different from the old site. . . . The change in sites suggests that the old site is not available to Ryan. If not, Ryan should be required to explain why it is not, and whether in fact it was available when he claimed that it was.
>
> (Joint Ex. R-3, p. 2.)

On October 10, 1986, Ryan filed his "Opposition to Motion for Remand" (Joint Ex. R-4) to which was attached Ryan's affidavit of October 7, 1986, in which Ryan stated:

> (T)he August 26 application is for a modification of the Construction Permit to correct the geographical coordinates. No change in transmitter site from that which I originally proposed over four years ago is involved in any respect. The site in question is owned by the Town of Brewster, and administered by the Brewster Industrial Development Financing Authority . . . . I located this site in June 1982, and confirmed its availability for lease (at a price of $400 per acre, per year) for my proposed tower in discussions at that time. A copy of the letter of Milton B. Shaw, Chairman of the Authority to me dated June 21, 1982, confirming its availability, is attached as Appendix A hereto. Moreover, the "Engineering Statement" submitted with my original application (and as Appendix B hereto) noted, at page 2:
>
> "The Brewster Industrial Park Development Finance [sic] Authority has issued a letter of consent to lease the proposed site to the applicant."
>
> This past Summer, after the grant of my Construction Permit and preparatory to finalizing a lease and obtaining local permits for the planned tower on this site, I employed a surveyor to survey the site and prepare an appropriate map plotting the location of the tower. In conducting that survey, it was revealed that the coordinates specified in the original application were off by several hundred feet, and accordingly I directed my Consulting Engineer to prepare an application to modify the permit to correct the coordinates to those revealed by the survey....
>
> * * *
>
> In sum, I intended to use, and made arrangements to use, the site owned by the Town of Brewster when I filed my application in 1982; I have always intended to use that site; and have proceeded to finalize the necessary arrangements to use that site after my permit was granted. In the course of finalizing these arrangements, a survey showed that the site had slightly different coordinates than as stated in the application, and so I filed an application to make the minor correction necessary, but the site itself has never been changed.
>
> (Joint Ex. R-4, pp. 6-7 (Att. 2).)

39. On October 14, 1986, at a meeting at Ryan's home preparatory to a meeting that evening with the Brewster Board of Appeals, Ryan gave copies of the October 1, 1986, "Motion for Remand" and his October 10, 1986, "Opposition to the Motion for Remand" to Callahan. (Tr. 1852.) Callahan believes that Ryan gave him a copy of the Ryan Affidavit of October 7, 1986, attached to the opposition at some time, but could not recall when. He has no recollection of ever having told Ryan that he thought it was inaccurate. (Tr. 1484-1485.) On October 20, 1986, Ryan wrote to Callahan, forwarding, *inter alia*, a copy of the FCC's "Opposition to the Motion for Remand." (Tr. 1853; FCCL Ex. R-17.) On October 22, 1986, Callahan wrote to Ryan on a variety of subjects. With regard to the proceeding before the Court of Appeals, Callahan stated as follows:

> RE: KRAVETZ MEMO...IF YOU NEED ANY ASSISTANCE WITH TESTIMONY WITH THE COURT OF APPEALS...DON'T HESITATE TO ASK...I AGREE THAT'S AN UNUSUAL TACT HBZ AND AND *(sic)* CANNON TO MISS THE BRIEFS AND CALL FOR A REMAND...POSSIBLY A "DESPERATE" MOVE? LET ME KNOW IF ANY ASSISTANCE IS NEEDED WITH THE 11/24 BRIEF.
>
> (Cannon Ex. R-1, p. 24 (Att. 3).)

Issue relating to Promises of Equity to Steven Callahan and John W. Miller

STEVEN CALLAHAN

40. Ryan and Callahan had first met at a luncheon on January 22, 1986, having been introduced by a mutual friend. (Cannon Ex. R-1, p. 1.) At that time, according to Callahan, Ryan stated that he was quite interested in employing Callahan as his Chief Engineer, although no terms of employment were discussed. (Cannon Ex. R-1, p. 2.) Ryan, however, was not prepared to offer Callahan the

position at that time on the basis of a single luncheon meeting. Ryan had not seen Callahan's resume, which Callahan did not send Ryan until after the luncheon meeting. (FCCL Ex. R-2A, p. 5, and Att. E (p. 30).) Over the next few months, the two spoke intermittently on the telephone. (Cannon Ex. R-1, p. 2.) On June 2, 1986, shortly after being awarded the construction permit, Ryan wrote to Callahan, suggesting that the two meet again, and inquired how Callahan thought he "could best tie in" with the prospective station, and whether his compensation desire was "as consultant, part-timer or full-timer." (Cannon Ex. R-1, p. 20 (Att. 1).)

41. On June 9, 1986, Callahan responded to Ryan's letter. (Cannon Ex. R-1, p. 22 (Att. 2).) He suggested an employment arrangement tailored to Callahan's concept of Ryan's needs based upon what Callahan described as his dual perspective as a technician who had built several stations for others, and as an owner who had "recently built WFTI-FM from the ground up."[15] Callahan suggested that he should serve as a part-time "consultant/general contractor" during the initial stage of construction; switch to full-time participation at the equipment installation phase; and return to part-time participation when the station became operational. Callahan proposed that he receive "a percentage of equity participation in return for designing, building, maintaining and delivering to you a fully operational and fully equipped Class B FM stereo radio station." (Cannon Ex. R-1, p. 22.)

42. As noted previously, Callahan and Ryan met on June 16, 1986, on Cape Cod. This was the second time the two had met. According to Callahan, Ryan orally assured him that he would receive an equity position for his efforts, as would John Miller who was to become station manager.[16] (Cannon Ex. R-1, p. 3). Callahan, however, stated that "Ryan told me then that he could not commit to giving me a specific equity interest...." (Cannon Ex. R-1, 3.) According to Callahan, Ryan repeated his oral "promise" of equity on at least three or four occasions during the summer and autumn of 1986, Ryan stating that Callahan and Miller "would receive equal equity positions, but that Ryan could not give any equity to us until one year after the 'Shark,' as Lynn Landy the shareholder of Cannon Communications Corporation was called, was no longer part of the FCC proceeding." (Cannon Ex. R-1, p. 4.) According to Callahan, Ryan said that there would be equity received one year after the station had been on-the-air, and that Ryan could not specifically put down any dollar amounts or percentage amount until a year after the station had been operational. (Tr. 1278, 1282.) At no time did Ryan tell Callahan the form of equity he would receive, whether Callahan would become a joint venturer, a general or limited partner, a voting or non-voting stockholder or some other form of owner, or what percentage of "equity" he was to receive, or whether or not he would have to pay for such interest. (Tr. 1278-1280.)

43. Ryan has denied ever promising Callahan (or Miller) an equity position at his station. According to Ryan, he would have been a fool to have promised an equity position to Callahan on their second meeting and before the two had worked together for one day. While Ryan recognized that equity participation by key employees was a good motivator and that he might ultimately offer some type of equity participation to key employees who had proven themselves over a period of time, and conveyed this view to Callahan, he never promised him equity on June 16, 1986, or at any other time.[17] (FCCL Ex. 2A, p. 7.)

44. From June 16 through mid-October 1986, Callahan was on the Cape for Ryan-related activities -- on July 12, July 24, September 9, and October 14.[18] (Tr. 1435-1441). During that period, he was employed full time as Chief Engineer by Stations WEAN and WWLI in Providence, Rhode Island, but left their employ and moved to Florida in November 1986. (Tr. 1290.) On October 22, 1986, shortly before moving to Florida, Callahan wrote to Ryan, *inter alia*, making a new proposal as to his compensation for constructing the station and serving as its part-time engineer. Unlike his letter of June 9, 1986, in which he had proposed to construct the station in return for equity, his October 22, 1986, letter proposed that for a period of "approximately a year, or until I sell WFTI in St. Petersburg," he would be available full time while building the station, and seven days per month thereafter, in return for which he would receive a "retainer" of $1,200 - $1,500 per month, plus expenses, including air-fare to and from Florida, and lodging and meals while on Cape Cod. The letter made no mention of any equity participation, but does suggest that "any additional compensation could come at a later date which is mutually acceptable to both of us." It does not explain what "any additional compensation" would be for, or claim that "any additional compensation" had actually been agreed upon or offered. Nevertheless, according to Callahan, "any additional compensation" was a cryptic reference to equity. It was designed to satisfy Ryan's instructions that nothing about equity be put in writing for fear that competing applicants would discover such written documents.[19] (Cannon Ex. R-1, p. 25 (Att. 3).) Ryan accepted Callahan's retainer proposal and paid him a retainer of $1,500 a month, plus expenses, commencing in November 1986 and continuing through March 1987 when Callahan resigned.

45. Cannon Exhibit R-2 is an affidavit of Callahan dated December 22, 1988, in which he recounts having a pizza with Ryan one evening before the station signed on, at a restaurant near the station's studios identified by Callahan as the "Nor'easter." According to Callahan, he explained to Ryan his concern that he had no documentation of their "oral agreement" regarding equity and that he viewed working with Ryan to be "very positive... I considered him like a second father." At that point, according to Callahan, Ryan began to cry, said he was ashamed to have anyone see him "puddle up," but assured him not to worry -- "that he, John Miller, and I would 'own and operate WFCC.'" Callahan's October 2, 1987, affidavit does not mention this incident. Callahan first testified that he had no recollection of having described the event to Cannon's counsel during their 1987 consultations. (Tr. 1170.) Shortly thereafter, he stated that he believed that he had revealed it to Cannon's counsel prior to the preparation of his 1987 affidavit. (Tr. 1171.) Ryan, in his rebuttal affidavit of January 10, 1989, acknowledges having a pizza with Callahan one evening during the period in question; points out that the restaurant was named the "Sou'wester"; and states that the conversation described by Callahan never took place. Rather, according to Ryan, "the only matters discussed...involved the state of the station's construction, and installation of equipment at the studio, of which he (Callahan) was in charge." (FCCL Ex. R-2, p. 4.)

46. Shortly before leaving WFCC, Callahan drafted "what I felt was the agreement that we had," which he submitted to Ryan. (Tr. 1285.) The proposed agreement (FCCL Ex. R-2A, p. 32 (Att. F)) sets forth the services Callahan "agrees to provide" and the compensation Ryan would provide to Callahan. The proposed agreement also provides that "one year from the air date of WFCC, Callahan could be eligible for equity participation in the ownership of WFCC. If such equity is not forthcoming, or if this agreement is terminated by either party before that date, then Callahan will be entitled to be compensated . . . in an amount equivalent to the total hours worked . . . multiplied by Callahan's hourly rate for consultation," less amounts paid under the retainer arrangement. Neither Callahan nor Ryan ever executed the proposed agreement, nor did they ever discuss its substance because Callahan left the station a few days after presenting the document to Ryan. (Tr. 1285- 1286; FCCL Ex. R-2A, p. 32 (Att. F).)

47. Callahan left Ryan's employ on March 31, 1987. (Tr. 1180.) At this point, according to Callahan, the relationship between Ryan and himself was amicable. (Tr. 1180.) Some ten days later, Callahan sent Ryan a bill for $36,000 for services, and another for $11,850 for an auxiliary transmitter. The transmitter had been obtained from a station in Springfield, Massachusetts, at no cost to Callahan, and shipped to WFCC at Ryan's expense. Subsequent to Callahan's departure, Ryan was advised by his replacement, Mr. Jolls, that the transmitter was useless. (FCCL Ex. R-2A, p. 3.) By letter of May 11, 1987, Ryan responded with indignation, advising Callahan that he would discuss the matter only through his attorney, Donald Ward. (FCCL Ex. R-2A, p. 29 (Att. D).) Ryan's indignation was attributable, *inter alia*, to the fact that Callahan was billing him $11,850 for an auxiliary transmitter which had cost Callahan nothing; for which Ryan had paid the shipping costs; which Ryan had been advised was "useless"; and which only two weeks previously Callahan had offered to swap the transmitter for Ryan's boat. (FCCL Ex. R-2A, p. 23 (Att. B).)

48. Callahan then contacted Mr. Ward and told him he would like to get together with Ryan to negotiate a settlement. According to Callahan, Ward told Callahan that he would get back in touch, but he never did. (Tr. 1183.) On May 14, 1987, Callahan wrote to Ward as follows:

> To this day, I cannot say one negative comment about Joe. My primary wish is to be able to walk down Main Street in Chatham and not have to have him cross to the other side to avoid me. I'm sure we can develop a fair and equitable negotiation of my hours, expenses and equipment, but I most want to regain my once favorable relationship with Joe.
>
> (Joint Ex. R-9, p. 30 (Ex. 4).)

49. Callahan telephoned Cannon's counsel in early June 1987. (Tr. 1162-1184.) He told them of his unsuccessful efforts to secure payment from Ryan of his bills, but they did not offer their assistance in prosecuting the claim. (Tr. 1184-1185.) Callahan told Cannon's counsel that he had information about the case, and explained some of the points that he had. Cannon's counsel listened, and said that he would be back in touch. (Tr. 1164.) When Cannon's counsel got back to Callahan "several months" later, they asked him to come to Washington for an interview which he did shortly thereafter on August 3, 1987. (Tr. 1165-1167.) Callahan stated that his motive in contacting Cannon's counsel was his belief that a wrong had been committed that had to be righted, and that Cannon's counsel had demonstrated their expertise in wrong-righting in the disqualification of Heather Stengel at an earlier stage of this proceeding. (Tr. 1535-1536.)

50. At their first meeting, Callahan made clear to Cannon's counsel that he expected to be compensated for his "time" and "expense." Callahan initially suggested that he might be compensated by employment at one of the radio stations owned by Ms. Landy's husband, by brokering the acquisition and installation of equipment at those stations, or by employment at the Cannon station if his testimony enabled Cannon to obtain the construction permit. (Tr. 1175-1177.) Cannon's counsel did not accept any of those alternatives, but told Callahan that they would examine the matter and could come to some type of agreement.[20] (Tr. 1174-1175.) On September 16, 1987, Ms. Landy wrote Callahan agreeing that Cannon, in return for Callahan's affidavit and testimony, would pay him all his expenses incident thereto plus "reasonable compensation for your loss of time in providing the affidavit or testimony."[21] (FCCL Ex. R-6.) Pursuant to that agreement, through November 1987, Cannon had paid Callahan a total of $4,066.54 for his services and out-of-pocket expenses in preparing his affidavit of October 2, 1987. (FCCL Exs. R-7, R-8.) However, although FCCL Ex. R-6 makes it clear that Cannon has agreed to pay Callahan for his loss of time and expenses in providing testimony, the record does not disclose the amount Cannon has paid or obligated itself to pay Callahan since November 1987 for Callahan's "loss of time" and expenses in testifying and providing intervening services. Among the expenses for which Cannon is reimbursing Callahan are the charges of the attorney who has represented him at his deposition and at hearing. (Tr. 1158.)

JOHN W. MILLER

51. John W. Miller, who served as station manager of WFCC(FM) from January 1987 through October 1987, first began assisting Ryan in the preparation of plans for the Chatham station in September and October of 1985. (Tr. 1597, 1602; Cannon Exs. R-15, R-16.) Ryan and Miller maintained contact during the eight to nine months prior to the Commission's denial of the applications for review in May of 1986, and Miller participated in decisions during that time even though plans for construction were not made until after the applications for review were denied. (Cannon Ex. R-16.) Miller began to spend time working on Ryan's proposed station beginning in May of 1986, but did not begin receiving compensation until January of 1987. (Tr. 1645.)

52. Early in Miller's relationship with Ryan, Miller told Ryan that he wanted to obtain an equity interest in the Chatham station in exchange for his services. Prior to the time in May of 1986 that he and Ryan began discussing a role for himself at Ryan's proposed station, Miller had been working at Station WQRC(FM), Hyannis, Massachusetts, and WCVX-TV, Vineyard Haven, Massachusetts, and had equity in both of these broadcast operations. (Tr. 1600-1602). On May 3, 1986, Miller wrote to Ryan and indicated that, if he were to leave his present employment, he had two requirements for determining his compensation at Ryan's proposed station. (Cannon Ex. R-3, 4.) In addition to maintaining his present standard of

living, Miller required "a meaningful equity position in the venture" that he married with "heart, sole [sic] and sweat." (*Id.*) Miller said that by "meaningful equity position" he had meant an interest greater than the three percent interest he then held in the licensee of Station WCVX-TV. (Tr. 1607-1608.) On May 9, 1986, Ryan wrote Miller, stating that while his applicant was a "100 percent Joseph A. Ryan sole proprietorship," he agreed with Miller's assumption that "the entity may or will change as circumstances change." (Tr. 1611-1612.)

53. On June 5, 1986, Miller wrote to Ryan, stating:

> You are aware from our talks and what you read in that WOCB document I prepared that equity is not only very important to me, but a heavy motivator for me. I will be quite literally pouring my heart, sole and marketable abilities into this venture . . . and no amount of salary alone will be fulfilling.
>
> I am aware of the constraints upon your ability to modify ownership at least during the first year of licensing, and you did indicate in a previous letter that the ownership entity will likely change thereafter.

In this letter, one paragraph later, Miller stated:

> One way or the other, I would like to acquire a 35 percent interest over a period of time. I hardly expect you to give away your assets, but based on your own experience at WCVB, I suspect you recognize the value of truly vested employment. Initially, it would be very important for me to acquire a floor of a 15 percent interest within 18 months of licensing. . . .

(Cannon Ex. R-4, p. 4.)

54. On October 1, 1986, Ryan made his first written salary proposal to Miller, offering him $45,000, four percent of cash receipts in excess of $500,000, and insurance benefits. (Tr. 1613.) No equity was proposed. (Tr. 1614.) Miller immediately contacted Ryan and scheduled a meeting because the offer was not acceptable. (*Id.*) Miller indicated that he was not satisfied because Ryan's proposal included a salary that was $15,000 less than the $60,000 he then earned, included contingent compensation in which he was not interested, and did not include equity. (Tr. 1614-1615.)

55. On October 7, 1986, Ryan and Miller met to discuss the proposal that Miller found unacceptable. At this time, Miller raised the issue of his salary and equity, *i.e.*, that Miller wanted a minimum of a 15 percent interest in the station, and this matter was discussed during the October 7, 1986, meeting with Ryan. (Tr. 1618-1619.) According to Miller, he asked Ryan whether he would entertain the notion of providing an equity position when it would be appropriate for Ryan to do so, and Ryan responded "yes." (Tr. 1622.)

56. On October 8, 1986, one day after the meeting with Ryan, Miller wrote a letter to Ryan stating, in part, as follows:

> We covered a great deal of ground during our discussions at your house Tuesday night. With respect to future ownership participation, we agreed that Don Ward would be asked to pass judgment on means of giving something more tangible than an "agreement to agree" without compromising the Commission's position on stations created through the comparative process.

(Cannon Ex. R-5.)

57. The letter went on to state further, as follows:

> It seems to me that one of the cleanest ways to tamper with your 100 percent representation during the minimally required portion of your full retention would be in the form of an option. That is, a definitive written agreement whereby I would acquire a predetermined interest at a predetermined price during a certain future period of time.
>
> I believe that the existence of such an agreement during the first year of your 100 percent licensee status does not run contrary to either the spirit or letter of the Commission's policies or your representations, for it can be written in such a way that I could not exercise the option until a certain specified date.
>
> Beyond this, and subject to your own long term objectives, I would also have an interest in entering into a right of first refusal on any future full or partial equity interests you now own. Since no one can determine future values at this time, any such agreement should provide for one or more mechanisms for determining price down the road (most likely related to a response to an asking price or a bona fide offer to purchase).

(Cannon Ex. R-5.)

58. On October 23, 1986, Ryan again wrote to Miller, setting forth a revised proposal for Miller's compensation. This proposal, apparently agreed to by Miller, called for a salary of $55,000, or $5,000 less than Miller currently was making. (Tr. 1615, 1635; Cannon Ex. R-14.) Despite what Miller believed to be the "agreement to agree" reached on October 7, 1986, and the subsequent October 8, 1986, letter requesting a written definitive "agreement," Ryan's letter did not directly address the equity issue. In concluding his letter, however, Ryan stated that:

> This agreement -- which can be "refined" at a later date -- will cover the first year of on-air operation.

(Cannon Ex. R-14.)

59. Four days later, on October 27, 1986, Miller again wrote Ryan. In this letter, Miller discussed the progress of his counsel and Ryan's counsel in addressing his request for an equity interest. (Cannon Ex. R-6.) Miller stated that Ryan was in "broad [albeit non-committal] agreement" that this important requirement can be achieved. In the letter, Miller indicated that counsel for Ryan conveyed concern about the pending litigation over the Chatham station, but acting at Ryan's request, "laid upon the table

some loose ideas about possible ways to achieve it." (*Id.*) Miller confirmed that the "it" they were trying to achieve was Miller's "future equity interest," and that one of the loose ideas was a concept "called 'phantom stock.'" (Tr. 1642; Cannon Ex. R-6.) Miller again reminded Ryan of his "threshold" requirement of a 15 percent equity interest and stated that "I'd like to think that agreement on this issue can be reached by the time we 'refine' the compensation arrangements you confirmed in your note of October 23rd to me." By this, Miller meant that if Ryan had in mind refining their agreement, then he thought his request for equity would be something to be included in the refinement process. (Tr. 1648-1650.)

60. On December 9, 1986, Miller wrote to Ryan again, addressing the compensation agreement between Ryan and Miller. Miller stated:

> On another matter, not that you've forgotten, I'm sure we're both anxious to come to terms on this equity participation issue. I have placed blind trust and confidence into your counselled "yes" response to your agree-ability to such consideration. However, there is little perceptible movement on the part of Don Ward or Jim Edmundson, but this has not diminished my genuine concern on the topic.
>
> I am still prepared to invest (or loan?) some dollars, including . . . as I mentioned some time ago . . . using equity in personal assets as collateral on additional funds. Regarding the latter, I could borrow a fair amount of money and would do so provided that the station's operation reimburse me for interest on borrowed funds. Since First Class Communications, Ltd., will be a corporation, as I understand it, it still seems to me that an option to acquire a future interest is a viable way to approach the objective.
>
> (Cannon Ex. R-7.)

Miller's reference to Ryan's "counselled 'yes' response" was to the "agreement to agree" which he believed he reached during the October 7, 1986, meeting. (Tr. 1658.)

61. On January 23, 1987, Miller again wrote Ryan and stated, in part, as follows:

> After further soul searching and discussion with Gail, coupled with my already clearly stated need for future equity, I take this opportunity to give you more lucid insight into my willingness to put money and/or collateral where my mouth is. Under appropriate circumstances, I'd be willing to allow my unencumbered assets to be joined with yours as collateral....
>
> Many months ago I proposed that I eventually acquire a 15% equity interest in the station in exchange for my devotion to managing the station with you and $30,000 cash. As I proposed to Don Ward in early December, this could be handled in the form of a convertible debenture that could be converted into stock after the one year FCC required waiting period or in the form of a simple loan to the corporation in exchange for an option that I could exercise after the year's waiting period.
>
> You and I are both waiting to hear from Don Ward on this concept, and I can only assume he does not recognize the importance of this caveat relative to my long term commitment to you and the station. I hope that gets remedied soon. While I trust your prior word implicitly, the fact is that it will not be accomplished until it is in writing.
>
> * * *
>
> ...I extend to you my qualified willingness to convert my net worth into either collateral for a bank or into cash. . . . The 'qualification' mentioned above would be a 49% interest in the corporation handled in the manner proposed to Don Ward so as to circumvent the one year "no change" obligation to the FCC's rules.
>
> (Cannon Ex. R-9.)

62. According to Miller, Ryan never gave him an express or implied commitment to give him equity. Ryan went no further than to agree that "at some point when it's appropriate, (Ryan) would . . . entertain the notion that (Miller) would be in a position to acquire an equity interest" (Tr. 1622) -- *i.e.*, Ryan would consider it at the point when he would be in a position to consider it. (Tr. 1623-1624.)

63. Unlike Callahan and Ryan, Ryan and Miller have remained personal friends. (Tr. 1597.) Miller did not leave Station WFCC until several weeks after Lynn Landy's visit to the Chatham station in October of 1987. (Tr. 1597.) When Miller left, he continued to serve as a consultant to Joseph Ryan for approximately six months. (Tr. 1597-1598.) Miller has started a new sales representation business and hopes to do business with Ryan, and he has discussed this possibility with Ryan.

Landy's Meeting with Ryan (Issue D)

64. Shortly after the filing of FCCL's modification application, Cannon's counsel sent Ms. Landy a copy of the Commission's public notice of the filing. Landy immediately contacted her attorney in Chatham to ascertain who could plot the coordinates for her. (Tr. 2081.) Landy retained a surveyor to plot the two sets of coordinates specified by FCCL and learned that two entirely different plots of land were involved. (Tr. 2136-2140, 2144-2145.) Therefore, Landy did not believe that FCCL's modification application was prompted simply by a need to correct coordinates following a survey, as the application recited. (Tr. 2141-2142.) Thus, based on these circumstances, Cannon filed the "First Motion for Remand" with the Court of Appeals, alleging that FCCL had, in fact, changed its transmitter site. (Tr. 2079-2080, 2144-2145.)

65. Shortly after receiving the initial telephone call from Callahan, Ms. Landy's counsel informed her of the call. (Tr. 2084-2085.) During the course of that call and subsequent telephone conversations during the early part of the summer of 1987, Ms. Landy asked her counsel to advise her on the propriety of talking with Callahan and requested them to meet with Callahan face-to-face. (Tr. 2086-2088.) Ms. Landy's counsel agreed to meet with Callahan for this purpose, but, according to Landy, counsel advised her from the outset that if his information

proved probative and credible, she would be obligated to provide the information to the FCC and pay the legal expenses.[22] (Tr. 2087-2088, 2156.)

66. After several telephone conversations with Callahan during the summer and a lengthy face-to-face meeting with him in early August 1987, Ms. Landy's counsel advised her that they believed Callahan's information was credible and potentially significant. (Tr. 2094-2099.) Based on this assessment, Ms. Landy authorized her attorneys to talk further with Callahan for the purpose of gathering the facts from him and putting them in an appropriate form for submission to the Commission, the Court of Appeals, or both, if the facts warranted such action. (Tr. 2086-2088, 2156.) Accordingly, Cannon's attorneys worked with Callahan in the preparation of his affidavit throughout August and September of 1987.

67. At the time Ms. Landy authorized the preparation and filing of the Callahan affidavit, the case had been pending for over six years and appeared destined for many more years of litigation unless the parties could agree to settle it. According to Ms. Landy, she asked her lawyers while they were working with Callahan, whether the Commission would approve a settlement in a case such as this. She was advised that there was legal precedent for Commission approval of settlement agreements in which one party was alleged to have engaged in wrongdoing. (Tr. 2151-2152.) Ms. Landy did not request research on this question or a recommendation as to possible settlement structures or terms, because she did not want the "meter running" at such an early stage. (Tr. 2152.) Ms. Landy was uncertain whether the Commission would view Callahan's allegations as seriously as she did. It was conceivable that, depending on Ryan's response to the allegations and the Commission's reaction thereto, the Commission would not find it necessary to designate the allegations for hearing or consider them in any request for approval of a settlement agreement. Also, one settlement possibility considered by Ms. Landy -- a buy-out of Ryan for the out-of-pocket expenses he had incurred in placing the station on the air -- would have removed him from the station and thus eliminated his character qualifications as an issue in this proceeding. (Cannon Ex. R-10, paras. 6, 8). As the Callahan affidavit was being finalized in September of 1987, Ms. Landy decided to make one more settlement overture to Ryan. Landy had attempted to settle the case on numerous prior occasions, including at the commencement of the original comparative hearing, but on each such occasion, the settlement discussions proved fruitless. (Cannon Ex. R-12, para. 2.)

68. According to Landy, she requested her lawyers to advise her on what she could and could not do or say in the proposed settlement meeting, which she decided to have with Ryan. (Tr. 2105-2108, 2153, 2164, 2166-2167.) She was advised that she could not offer to withhold the affidavit from the Commission in exchange for a promise of settlement or any other consideration from Ryan. According to Landy, she understood that she was obligated to tell Ryan that the affidavit would be filed with the Commission regardless of the outcome of their meeting, and that she could not use the threat of filing the affidavit with the Commission to induce Mr. Ryan to settle the case. (Tr. 2166.) Ms. Landy made the decision that before she left Chatham for New York City in October 1987, she would visit Ryan at his station to discuss settlement possibilities after Callahan had signed the affidavit. (Cannon Ex. R-12, para. 3.)

69. Landy instructed her attorneys that, when Callahan's affidavit was complete, he should execute two copies before a Notary Public, with one copy to be sent to her attorneys and one copy to be sent to her. (Tr. 2146.) She stated that her purpose in having an original affidavit sent to her was that she intended to take her copy to Ryan, and she wanted to make it very clear to him that she wasn't bluffing; that Callahan had actually executed the affidavit with which she intended to persuade Ryan to settle the case.[23] (Tr. 2146-2147.) According to Landy, it was her hope that the Callahan affidavit would be presented to the Commission as part of a joint request for approval of a settlement agreement, and that the issues raised by the affidavit could be examined and resolved by the Commission in that context, rather than through costly and time-consuming adverse litigation. (Tr. 2107-2108, 2148; Cannon Ex. R-10, para. 3; Cannon Ex. R-12, paras. 1 and 3).

70. Callahan executed two copies of the affidavit on October 2, 1987. (Tr. 2145-2147.) In accordance with Landy's instructions, one was Federal Expressed to her in Chatham, and she received it some time after 10:30 a.m. on October 5, 1987. After reading the affidavit, Ms. Landy took the affidavit with her and drove to the station from her home, which is located about two miles from Ryan's station in Chatham, arriving sometime between 11:15 and 11:30 a.m. (Tr. 2142-2143.) Landy did not have an appointment to meet with Ryan. (Tr. 2115.)

71. Most of the facts concerning Ms. Landy's visit to Ryan's station are not in dispute. When Mrs. Landy arrived at the station, she approached the receptionist's desk, identified herself to the receptionist as "Lynn Landy," and stated that she "would like to see Mr. Ryan." (Tr. 2116-2117.) The receptionist responded that she would "go and find him." (Tr. 2115.) Shortly thereafter, Ryan appeared and Landy took three or four steps toward Ryan, extended her hand to him, and stated "Hello, Mr. Ryan. I'm Lynn Landy." (Tr. 2116.) Ryan then escorted Ms. Landy to his office.

72. Ms. Landy sat down in a chair in front of Ryan's desk, removed the Callahan affidavit from an envelope, and handed it across the desk to Ryan. At that point, Ryan excused himself to get his glasses from the conference room where he had left them. (FCCL Ex. R-1, Appendix A.) Upon his return to his office, Ryan read the affidavit and pushed it back towards Ms. Landy. She commented that it was "interesting." (Cannon Ex. R-10, para. 4; FCCL Ex. R-1, p. 3 (Appendix A).) Then, according to Ms. Landy, after Ryan read the affidavit and she said it was "interesting," Ryan responded, without any elaboration, that it contained "some inaccuracies." According to Ryan, when Landy said it was "interesting," he responded "yes, but untrue." (Cannon Ex. R-10, para. 4; FCCL Ex. R-1, 3 (Appendix A).)

73. According to Ryan, Landy then stated: "I don't want to put this in the hands of the FCC." (FCCL Ex. R-2A, p. 22 (Att. A, p. 2).) Ryan then inquired why Landy had brought the document to him. (Cannon Ex. R-10, para. 5.) Landy replied that she wished to make a proposal: that he could give her 51 percent of the station, or sell her 100 percent for his investment in the station. (FCCL Ex. R-2A, p. 22 (Att. A, p. 2); Cannon Ex. R-10, para. 6.) Although Landy did not offer payment if Ryan took the 51 percent option, she knew she would have to pay him something in return, and that she was just making a "preliminary offer" that was "an invitation to talk." (Tr.

2148-2152.) Ryan did not respond other than to say that the matter would be placed in the hands of his attorney. (FCCL Ex. 2A, p. 22 (Att. A, p. 2); Cannon Ex. R-10, para. 7.) Landy then departed, telling Ryan to call her in Chatham or New York City if he was interested in discussing her proposal. (FCCL Ex. 2A, p. 22 (Att. A, p. 2).)

74. Landy disputes Ryan's account. According to Landy, Ryan asked why Ms. Landy had brought the Callahan affidavit to him, to which Landy responded "because [he was] in the driver's seat." (Cannon Ex. R-10, para. 4.) Ryan then stated that he assumed his lawyers had a copy of the affidavit, but Ms. Landy responded in the negative and explained that she had not shown the papers to anyone else, and that Ryan's lawyers could read the document at their convenience at her lawyer's office. (*Id.*)

75. According to Landy, she told Ryan that she was obligated to show the affidavit to the FCC. She then stated that the proceeding had been going on for some time, that she was sure it had cost him a lot of money, and that it had cost her in excess of $100,000. (Cannon Ex. R-10, para. 6.) She pointed out that if they were to litigate the issues raised in the affidavit, it would probably go on for several more years and cost each of them another $100,000. She stated that rather than continue the litigation, they should settle the case. Ryan did not respond. It was then that Landy made her settlement proposal to Ryan as set forth above. Ryan responded to Ms. Landy's proposal by saying that his lawyers would speak with hers, and that he would not talk to her. (Cannon Ex. R-10, para. 7; FCCL Ex. R-1, 2 (Appendix A, p. 2).)

76. Upon leaving Ryan's office, Ms. Landy returned to her home and immediately telephoned her counsel at about 11:47 a.m. on October 5, 1987, to report the results of the meeting. (Cannon Ex. R-13, p. 1.) Counsel, who did not know in advance what Landy was going to propose to Ryan, took contemporaneous notes of the conversation. (Tr. 2172; Cannon Ex. R-13, p. 2.) Counsel's notes reflect that Ms. Landy told her counsel to expect a call from Mr. Ward to read the Callahan affidavit. The notes also reflect that Ms. Landy told counsel that Ryan skimmed the Callahan affidavit, noted that it had some inaccuracies, and said little else during the course of the meeting. (*Id.*) The notes also reflect that Ms. Landy told counsel that she informed Ryan that she was obligated to file the affidavit with the FCC within 15 days, that she would rather not spend the time and money necessary to litigate, that Ryan's lawyers could review the affidavit in her attorney's offices, and that she had a settlement proposal. Counsel's notes also contain the observation of a possible "set-up" because Ryan did not ask Landy the type of questions counsel thought he would ask. (Tr. 2171-2172.)

ULTIMATE FINDINGS AND CONCLUSIONS

77. Following the remand of this proceeding from the Court of Appeals, the Commission specified basic qualifying issues against both Ryan, who wholly owns First Class Communications, Ltd., and Lynn Landy, the owner of Cannon Communications Corporation. The issues directed against Ryan involve: (1) questions of misrepresentation and/or concealment regarding his application filed with the Commission on August 26, 1986, to modify the construction permit to change the site coordinates, and (2) whether Ryan offered equity interests in the station to other individuals contrary to his representation that he would be the sole owner of the station. The issue specified against Lynn Landy seeks to determine whether she "attempted to obtain an equity interest in Ryan's station by improper means.."

78. The principal issue regarding Ryan's site modification application is whether Ryan was only correcting erroneous site coordinates as he represented to the Commission, or whether he was actually changing his site. When he filed his application in 1982, Ryan, in the narrative portion of his application, described his site as follows:

> The proposed location is within the Brewster Industrial Park which contains approximately 100 acres zoned for this and similar industrial uses. It will be necessary to clear some trees and underbrush for the tower base, transmitter building, guy anchors and the guy routes from the tower to each of three guy anchors. There is presently a roadway into the site from Freeman's Way which may have to be modified some slight amount to reach the actual site of the tower.
>
> * * *
>
> The Brewster Industrial Park Development Finance [sic] Authority has issued a letter of consent to lease the proposed site to the applicant. The proposed construction has not been the source of any local controversy on an environmental basis.
>
> (Joint Ex. R-1, p. 8.)

79. As noted in the application, Ryan, in fact, secured a letter from the Town of Brewster providing the applicant with the necessary "reasonable assurance" of the site's availability. Thus, it was clear that Ryan intended to use the Town of Brewster land as the transmitter site for his proposed station. However, unknown to Ryan or his engineer who prepared the engineering portion of the application, the site coordinates listed in the original application placed the site about 350 feet from the eastern boundary of the town property upon which Ryan intended to build his station. This was privately-owned land, and Ryan never secured "reasonable assurance" to use this land as his transmitter site. Clearly, Ryan's original application contains inherently inconsistent site information. Specifically, the narrative portion made clear that Ryan intended to build on the Town of Brewster property, yet the site coordinates in the application specified private land, not property owned by the Town of Brewster.

80. The Presiding Judge is persuaded that Ryan intended to use the Town of Brewster property as his transmitter site. Before filing his application, he visited the Town offices and secured a letter of site availability. Following the award of his construction permit, he immediately visited the Town offices to make arrangements for a lease for his transmitter site. Ryan's conduct was totally consistent with his intention to use the Town of Brewster property as his site. It is incomprehensible that Ryan would have obtained a reasonable assurance letter for

land he did not intend to use, but make no effort whatever to secure permission to use land he did intend to use. The coordinates appearing in Ryan's original application were a mistake in that they did not specify the Town of Brewster land which Ryan intended to use as his transmitter site.

81. The record provides no explanation how this error occurred. Whether Ryan, who is not an engineer, failed to provide a sufficiently precise oral description of the site when he telephonically communicated this information to his engineer, or whether Ryan's engineer may have misinterpreted the description Ryan gave him are the most reasonable explanations. While Cannon argues that Ryan may have believed that the land on the east side of the Gravel Pit Road was also owned by the Town of Brewster and specified this site mistakenly believing that it was Town of Brewster property, there is no creditable evidence supporting this speculation.

82. Following the award of the construction permit, Ryan asked Hart, a surveyor, to survey the property and place the site coordinates on the Town property, preparatory to finalizing a lease. It was as a result of the Hart survey that Ryan first discovered that the site coordinates did not fall on the Town of Brewster property which he intended to use. Ryan then filed, on August 26, 1986, a modification application to have the site coordinates fit the description of his site as contained in the narrative portion of the original application. That application represented that:

> This modification is to make a minor correction to the geographic coordinates and to the ground elevation at the base of the tower which results from the final survey of the proposed site as required by the town of Brewster prior to settlement of the final lease agreement.

Thereafter, in opposing a motion for remand, Ryan submitted an affidavit in which he explained the reason for the site modification as follows:

> (T)he August 26 application is for a modification of the Construction Permit to correct the geographical coordinates. No change in transmitter site from that which I originally proposed over four years ago is involved in any respect. The site in question is owned by the Town of Brewster, and administered by the Brewster Industrial Development Financing Authority.... I located this site in June 1982, and confirmed its availability for lease (at a price of $400 per acre, per year) for my proposed tower in discussions at that time. A copy of the letter of Milton B. Shaw, Chairman of the Authority to me dated June 21, 1982, confirming its availability, it attached as Appendix A hereto. Moreover, the "Engineering Statement" submitted with my original application (and as Appendix B hereto) noted, at page 2:
>
> The Brewster Industrial Park Development Finance [sic] Authority has issued a letter of consent to lease the proposed site to the applicant.
>
> This past Summer, after the grant of my Construction Permit and preparatory to finalizing a lease and obtaining local permits for the planned tower on this site, I employed a surveyor to survey the site and prepare an appropriate map plotting the location of the tower. In conducting that survey, it was revealed that the coordinates specified in the original application were off by several hundred feet, and accordingly I directed my Consulting Engineer to prepare an application to modify the permit to correct the coordinates to those revealed by the survey....
>
> * * *
>
> In sum, I intended to use, and made arrangements to use, the site owned by the Town of Brewster when I filed my application in 1982; I have always intended to use that site; and have proceeded to finalize the necessary arrangements to use that site after my permit was granted. In the course of finalizing these arrangement, a survey showed that the site had slightly different coordinates than as stated in the application, and so I filed an application to make the minor correction necessary, but the site itself has never been changed.
>
> (Joint Ex. R-4, pp. 6-7 (Att. 2).)

83. The reasons for and the circumstances surrounding the request to modify the construction permit, as stated by Ryan, represent a substantially accurate statement of the facts and do not constitute misrepresentation or concealment on the part of Ryan. The only evidence in the record to the contrary is Callahan's testimony. In this connection, Callahan has no contemporary knowledge of Ryan's site intentions, having first met Ryan four years after Ryan filed his application. But, according to Callahan, when he and Ryan inspected the area on June 16, 1986, Ryan told him that his site was the private land east of the Gravel Pit Road whose coordinates were specified in the original application, and this was the site he always intended to use.[24] Ryan denies telling Callahan any such thing.

84. Callahan's testimony will be rejected as unworthy of belief. First, the circumstantial evidence, and the reasonable inferences to be drawn therefrom, are clearly consistent with Ryan's intentions to construct his tower on Town of Brewster land and not on the private land. The narrative portion of his application makes reference to the Town of Brewster land as the transmitter site. Moreover, when Ryan received his construction permit, and well before Callahan came on the scene, he immediately took steps to secure the formal legal right to use his transmitter site. He went immediately to the Financing Authority which controlled the Town of Brewster land for the purpose of initiating the drafting of a formal lease. He did not approach the owner of the private land on which his application coordinates (then unknown to him) fell. At the suggestion of a Town of Brewster official, and as an incident to entering into a lease for the Town's site, he retained a surveyor to determine precisely where on the Town of Brewster land his application coordinates fell. The foregoing sequence of events is established by the testimony of both Ryan and Hart, and corroborated by

the Financing Authority's instructions to Hart that his services were needed in connection with the Authority's proposed lease to Ryan. Moreover, the record is devoid of evidence which in any way contradicts Ryan's testimony that the receipt of his construction permit triggered actions calculated to eventuate in a formal lease of the Town of Brewster land which he then believed was specified in his application. Clearly, Ryan's actions when he received his construction permit are entirely consistent with a belief on his part that his application specified Town of Brewster land. Those actions are wholly inconsistent with the intent ascribed to him by Callahan. Ryan first learned that his application coordinates were not on Town of Brewster land, but lay some 350 feet east of the eastern boundary of that land on private property, as a result of the Hart letter of June 11, 1986. When he immediately contacted his attorney and his consulting engineer, he told them that Hart had just advised him that his application coordinates were not on Town of Brewster land, and requested their advice as to appropriate action.

85. Not only is Callahan's testimony contradicted by Ryan, it is "inherently improbable" and "opposed to all reasonable probabilities . . " *The Prattville Broadcasting Co.*, 5 FCC 2d 601, 602 (1966). After all, why would Ryan have gone to the trouble of obtaining reasonable assurance to use a site he did not intend to use while failing to obtain such assurance with respect to the land he did intend to use.

86. There are other reasons which persuade the Presiding Judge not to credit Callahan's testimony. He is clearly a disgruntled former employee, and his prior behavior is inconsistent with his testimony. Callahan was of the view that Ryan owed him a substantial sum of money. When it became clear that Ryan was not going to pay Callahan, Callahan then contacted Cannon's counsel. In return for his cooperation and testimony, Callahan requested employment by Ms. Landy's husband, or payment for his expenses and for his time at his engineering hourly rate. He received the latter. As a result, Callahan has both generated work for himself, at his usual hourly rate, while at the same time gaining a measure of revenge against Ryan.

87. It is significant to note that when Callahan wrote to Hart about the proposed change in Ryan's site coordinates, he characterized the site modification as "a slight change.." (*See*, para. 25 of Findings.) Moreover, following the filing of the site modification application with the Commission, Callahan offered to assist Ryan "with testimony with the Court of Appeals.." (*See*, para. 40 of Findings.) Thus, Callahan was earlier of the view that the change in site coordinates represented a "slight change," and he also offered to assist Ryan in his case before the Court of Appeals when remand of the proceeding was being sought because of the site modification application. Yet, after Callahan left Ryan's employ, and after Ryan refused to pay Callahan the $36,000 for services and $11,850 for a used transmitter, Callahan offered his services to Cannon, despite earlier offering to assist Ryan in support of his modification application, and alleged facts inconsistent with his prior declaration of the site modification as a "slight change." Callahan's proclivity to change position does not instill confidence in his uncorroborated testimony and his improbable allegations.[25]

88. In summary, Ryan always intended to use the Town of Brewster site and the specification of erroneous site coordinates in his application was simply a mistake. The modification application was designed to correct the site coordinates; it did not constitute a change in the intended site. Specifically, the change in coordinates here cannot be fairly described as a change in site, because the intended site, as described in the textual part of the application, has not changed.[26] In this connection, making a mistake in specifying site coordinates is not an entirely uncommon occurrence. (*See*, for example, *Media Inc.*, 27 FCC 2d 231 (1971); *KWEN Broadcasting Co.*, 23 RR 828 (1962).) Moreover, there was no misrepresentation or concealment on the part of Ryan in connection with his modification application. *See, Fox River Broadcasting, Inc.*, 88 FCC 2d 1132 (1982). Cannon's argument that Ryan should have told the Commission how the error occurred, or offered a more elaborate explanation for the modification application, is rejected. The modification application was to correct erroneous site coordinates. Who was responsible for the error, whether Ryan or his engineer, and how the error occurred, was information not called for by the application nor required by the Commission. Cannon's attempt to turn an innocent mistake into disqualifying conduct is rejected.[27]

89. Issue (B) seeks to determine whether Ryan offered equity interests in his station to Callahan and Miller in conflict with his previous representation that he would be the sole owner of the station. The Findings establish that Ryan discussed with both Callahan and Miller the possibility of acquiring future equity interests in his station, but whether those discussions constituted a promise by Ryan of future equity is the question that must be resolved.

90. According to Callahan, Ryan orally assured him on June 16, 1986, that he would receive an equity position in the station. This was only the second time that Ryan had ever met with Callahan, and before Callahan had done any work for Ryan. Ryan acknowledges discussing Callahan's request for equity, but he did not promise Callahan equity, only that he would consider it after the station was on-the-air for a year. Ryan's contemporaneous notes of the meeting confirm his version of the conversation. In any event, it seems highly unlikely and improbable that Ryan would definitely offer Callahan an equity position in his station at the meeting on June 16. He hardly knew Callahan and was in no position to evaluate the quality of his work or his value to the station. While Ryan believes in awarding equity to key employees who have proven themselves over a period of time as a motivating factor, and conveyed this view to Callahan (and Miller), he told both that he could not consider granting either an equity position until after the station was on-the-air for a year. Thus, while Ryan discussed with both the possibility of future equity, in neither case did those discussions result in a definite and unequivocal promise of equity. With regard to Callahan, his letter of October 22, 1986, unlike his letter of June 9, 1986, does not refer to equity. This letter followed the June 16, 1986, meeting with Ryan at which time Callahan was told that equity could not be considered until the station was on-the-air for one year. Also, the agreement Callahan drafted prior to his departure from the station (which was not executed) is in accord with Ryan's testimony that no promise of equity had been made. (*See*, para. 47 of Findings.) In this connection, neither Callahan nor Miller were

promised any specific amount of equity. Nor was a specific type of equity promised or even discussed; whether a partnership interest, general or limited, was contemplated; or whether a stock interest, either as a voting or nonvoting stockholder, was envisioned. In any event, the discussions between Ryan and Callahan, and Ryan and Miller, were too general and non-specific to amount to a promise of future equity. While the correspondence between Miller and Ryan reflect Miller's desire to obtain from Ryan a written commitment of a future equity interest, there is no evidence that Ryan ever acceded to Miller's desire. Thus, notwithstanding Miller's reported requests and even after his proposal to acquire an equity interest by offering Ryan financial assistance using his personal assets as collateral, Ryan did not respond by offering or promising Miller any equity interest. At best, it appears that Ryan was willing to consider the question of awarding Callahan and Miller equity only after the station had been on-the-air one year. The Findings fail to establish that Ryan ever promised a specific amount or type of equity to either Callahan or Miller so as to compromise his representation that he would be the sole owner of the station. Only after the station was on-the-air for one year, would Ryan consider the question of equity to Callahan and Miller. Thus, Issue (B) must be resolved in favor of Ryan.

91. In summary, the Findings and Conclusions under Issues (A) and (B) do not reflect adversely on Ryan's basic qualifications to be a Commission licensee.

92. Issue (D) seeks to determine whether Lynn Landy, the principal owner of Cannon, attempted to obtain an equity interest in Ryan's station by improper means. The improper means referred to was Ryan's allegation that Landy, in effect, threatened to file Callahan's October 2, 1987, affidavit alleging misconduct by Ryan with the Commission, unless Ryan gave her 51 percent of the station or sold her 100 percent of the station. The conversation at which Landy allegedly made these remarks to Ryan occurred on October 5, 1987, in Ryan's office at the radio station.

93. The only major dispute between Ryan and Landy is whether Landy threatened to file the Callahan affidavit with the Commission if Ryan did not settle the proceeding on the basis of one of her two settlement proposals. Landy has adamantly maintained that she told Ryan that the Callahan affidavit would have to be filed with the Commission, and she did not threaten to file the affidavit if Ryan did not settle the case. Ryan acknowledged that Landy did not actually threaten him; it was something he inferred from Landy's conversation and tone.[28] (Tr. 2033-2034.)

94. While the Commission encourages mutually exclusive applicants to settle Commission proceedings, it is nevertheless improper for one applicant to threaten to use Commission processes in order to coerce another applicant. *James C. Sliger*, 70 FCC 2d 1565 (1979); *Patrick Henry*, 69 FCC 2d 1305 (1978). *See, also, Country-Politan Broadcasting, Inc.*, 60 FCC 2d 361 (1976); *Home Service Broadcasting Corp.*, 24 FCC 2d 192 (1970). Thus, it would have been improper for Landy to have attempted to coerce or threaten Ryan by offering to withhold from the Commission the Callahan affidavit. But, the Findings and Ryan's own testimony do not support the conclusion that Landy offered to withhold filing the Callahan affidavit. Rather, it appears that Ryan misunderstood Landy's remarks and inferred a threat where none was made or intended.[29] It is clear from Landy's testimony, and the notes made by her counsel immediately after the conversation, that Ryan was told that the Callahan affidavit would have to be filed with the Commission. Landy showed Ryan the Callahan affidavit and offered Ryan two settlement proposals from which negotiations could be started. She did not threaten to file the affidavit if Ryan did not settle, nor did she offer to withhold filing the affidavit if Ryan did settle. Thus, it is concluded that Landy did not use improper means in her attempt to acquire an equity interest in Ryan's station or to settle this proceeding. Issue (D) is therefore resolved in favor of Cannon.

95. All basic issues have been resolved in favor of the applicants, and both Cannon Communications Corporation and First Class Communications, Ltd., are basically qualified to be Commission licensees.

Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules,[30] the grant of the application of Ryan (now First Class Communications, Ltd.) (File No. BPH-820624AX) by the Commission in the earlier comparative licensing proceeding, *Cannon Communications Corp.*, 101 FCC 2d 169 (Review Board 1985); *rev. denied*, FCC 86-244 (May 15, 1986) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] The motion sought to analogize Ryan's modification application with the facts surrounding the disqualification of Stengel for site irregularities.

[2] Callahan executed two identical affidavits. He returned one directly to counsel, and (at counsel's request) express mailed the other copy to Ms. Lynn Landy, Cannon's 100 percent stockholder, at her summer home in Chatham. (Tr. 1233.)

[3] The burden of proceeding was placed upon Cannon with respect to Issues A and B, and upon Ryan with respect to Issue D. The burden of proof with respect to Ryan's basic qualifications (Issue C) was placed upon Ryan, and the burden of proof with respect to Cannon's basic qualifications (Issue D) was placed upon Cannon.

[4] The Initial Decision granted the application of Heather H. Stengel (Stengel) and denied the applications of, *inter alia*, Ryan and Cannon. The Review Board, based on new evidence, thereafter denied the application of Stengel and awarded the construction permit to Ryan. *Cannon Communications, Corporation*, 101 FCC 2d 169 (1985).

[5] This was a large (3' x 2') map principally encompassing the Town-owned industrial park, containing the boundaries of particular parcels therein which had already been subdivided. Contour lines denoting elevations at ten-foot invervals had been drawn in the southeast corner of the Town's park, where Ryan's site was to be located. Because of the number of differing maps

involved in this proceeding, this map will be referred to as the "Hart Map." The Hart Map does not contain lines of latitude or longitude.

[6] The coordinates in Ryan's application were approximately 750 feet from his desired site. (FCCL Ex. R-2, Att. B.)

[7] It appears, however, that a comparison of the two applications reveals that at the 1982 coordinates, the base of the tower would be 103' above mean sea level (Joint Ex. R-2), whereas his 1986 modification application (Joint Ex. R-2) showed the base of the tower would be 100' above mean sea level -- just three feet lower.

[8] Although Callahan acknowledges that Ryan showed him Mr. Shaw's letter at Ryan's home, and mentioned it again while describing his 1982 site selection process, he seeks to explain these away with the claim that he did not understand from Mr. Shaw's letterhead that the Brewster Industrial Development Financing Authority was a public agency with responsibility for the Town's Industrial Park. (Tr. 1381-1382.) Ryan, however, understood the public nature of Shaw's authority. Callahan offered no rationale for Ryan's showing him Shaw's letter, and alluding to it again during his description of his site selection process, if Ryan did not on that date (June 16, 1986) still intend to use the Town site for which he had obtained reasonable assurance when he originally filed his application.

[9] Ryan is a habitual note-taker and usually has a stenographic pad with him. FCCL Ex. R-2, Attachment D, comprises four pages of notes which Ryan made concerning the events of June 16, 1986, taken concurrently or immediately after those events. (Tr. 1832-1834.) Although Callahan testified that he never saw Ryan use stenographic pads and could not recall Ryan taking notes on June 16, 1986, Ryan had five steno notebooks, covering the period 1980 to 1987, with him during his testimony. (Tr. 1376, 1823.)

[10] According to Ryan, they walked into the area on the left side of the Gravel Pit Road. (Tr. 1829.) According to Callahan, they walked into the area on the right side of the Gravel Pit Road. (Cannon Ex. R-1, p. 7.)

[11] Ryan was wearing his dress shoes, and Callahan's shoes were less susceptible to being torn by the underbrush. (Tr. 1830.)

[12] Ryan's 1982 application proposed a tower of 449 feet above ground, but was amended in October 1982 to specify a tower height of 289 feet above ground, to meet FAA requirements.

[13] Although Callahan denies authorship of the "rough diagram" mentioned in his June 24, 1986, letter to Hart, the record does not suggest any other possible author.

[14] According to Callahan, when he stated the application was "overly creative," Ryan smiled in a smirking fashion and told Callahan that he and his FCC counsel did not want to raise any red flags concerning the application. (Tr. 1449-1450, 1553; Cannon Ex. R-1, p. 13.)

[15] Callahan's statement in June of 1986 that he had recently built Station WFTI was misleading. In fact, as of December 20, 1986, six months later, he represented to the Commission that the station's equipment had not yet been delivered. (Joint Ex. R-9, Ex. 5 (p. 31).) While he claims that he had completed the WFTI studio installation by June 1986, he concedes that he was unable to secure his originally intended transmitter site, compelling a modification application in December 1986 to specify a different site for WFTI. (Tr. 1505.)

He finally placed the station on the air in July 1988, and shortly thereafter applied to assign it to a third party. While his testimony as to when he agreed to sell WFTI was evasive (compare Tr. 1508-1517 (pre-break) with Tr. 1520-1521 (post-break)), the assignment application contained evidence that the agreement was reached before he filed the license application. (FCCL Ex. R-11, Ex. 2.) The WFTI(FM) license application (which was filed by counsel for Callahan's Assignee) contained no indication that he had agreed to sell the station.

[16] At this point, Callahan had done no work for Ryan. (Tr. 1277.)

[17] Ryan acknowledged that Callahan's request that he receive equity was discussed at their meeting of June 16, 1986. Ryan made the following notes shortly after their meeting:

"5) Money/Equity

o Told him cannot consider equity until after on air for 1 year.

o He sees his work as an 'investment'

o Will not charge by hour

o STILL UNSURE HOW (OR IF) HE IS GOING TO CHARGE ME."

[18] According to Callahan's diary, he was also on the Cape on September 26-28, 1986. At his deposition in September 1988, he was unable to identify any Ryan-related activity for those days. In his testimony, he claimed to have recalled since his deposition that he had attended the Massachusetts Broadcasters Association meeting at Martha's Vineyard on those dates, but in fact, the association meeting was held October 10-12, 1986. (Tr. 1437-1439, 1578, 1852-1853.)

[19] As will be seen hereafter, Miller apparently was not similarly instructed by Ryan because his letters contained repeated reference to equity participation.

[20] Pending reaching some sort of agreement, Callahan wrote Cannon's counsel the next day billing them for his expenses and stating: "I have no doubt that we will arrive at a point of agreement and that we will both be successful toward our mutual goal." (FCCL Ex. R-5.)

[21] The quoted language meant that Cannon would pay Callahan at the same $40 per hour rate which he billed Ryan for his time. (FCCL Ex. R-7, FCCL Ex. R-2A, p. 27 (Attachment A).)

[22] Similarly, the question of the appropriate method of reimbursing Callahan for expenses he might incur in preparing the affidavit arose during these early conversations, and Ms. Landy asked her lawyers to advise her on this issue as well. (Tr. 2088-2093.)

[23] According to Landy, the sight of the executed affidavit was supposed to convey to Ryan that the document was inevitably going to be filed with the Commission. (Tr. 2146-2147.) This, in turn, was supposed to motivate Ryan to settle because then the Commission would consider the affidavit in the context of a request to approve a settlement agreement rather than in the context of "litigation." (Tr. 2147-2148.)

[24] This is the major dispute between Ryan and Callahan. The Presiding Judge is in basic agreement with Cannon's argument that all conflicts between Ryan and Callahan need not be resolved to decide the issues.

[25] Also, Callahan's testimony on when he agreed to sell WFTI was evasive and appeared to be lacking in candor. Compare the testimony prior to the break (Tr. 1508-1517) with his testimony after the break (Tr. 1519-1521). While the matter itself is not particularly important, "the willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *FCC* v. *WOKO*, 392 U.S. 223 (1939).

[26] Cannon argues that Ryan always intended to construct his station on the private land east of the Gravel Pit Road and that the site modification application did not merely correct coordinates, as represented by Ryan, but changed Ryan's site from land owned by a private party to land owned by the Town of Brewster, and that Ryan did not disclose this information. This argument is not supported by the Findings and is otherwise unpersuasive. In this connection, it is clear that Ryan always intended to build on the Town of Brewster land, specified Town land in the narrative portion of his application, and secured a letter from Town officials to use the site. Under these circumstances, the coordinates erroneously placing the site on private property rather than correctly placing the site on Town property, which Ryan intended to use, was an innocent mistake and not the sinister wrongdoing Cannon would make it out to be.

[27] Cannon attempts to equate Ryan's site problems with that of Heather Stengel and argues that this created a motive for Ryan to misrepresent and conceal facts regarding his site modification application. But Ryan did not believe his situation was similar to that of Stengel, because Stengel did not have reasonable assurance of site availability. Ryan, on the other hand, had secured reasonable assurance of site availability and his station is presently constructed on the Town of Brewster site specified in the narrative portion of his application. Moreover, contrary to Ryan, Stengel had specified a number of different sites without reasonable assurance. *Cannon Communications Corporation*, 101 FCC 2d 170 (1985).

[28] In testifying in this proceeding, neither Ryan nor Landy exhibited demeanor characteristics which would lead the Presiding Judge to discredit their testimony.

[29] As previously noted, Ryan only inferred that Landy had threatened him.

[30] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 3, 1989

COMMENTS INVITED ON COLORADO REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Colorado area (Region 7).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 7 consists of the State of Colorado. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 89-452, Colorado Area - Region 7,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497 or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 29, 1989

COMMISSION CLARIFIES POLICIES REGARDING LICENSEE PARTICIPATION IN DRUG TRAFFICKING

This Public Notice clarifies Federal Communications Commission policies regarding the participation of private radio, common carrier, broadcast, and other radio licensees in drug trafficking.

Eradicating illicit trafficking in narcotics, drugs, and other controlled substances today is a major Federal public policy priority. This is evidenced by congressional, judicial, and presidential actions and declarations. Last year, for example, Congress passed the Anti-Drug Abuse Act of 1988, which includes a provision (§ 5301) permitting judicial denial of federal benefits to persons convicted of drug offenses. The President recently transmitted to Congress his plan for implementing that statute. Drug trafficking is severely affecting the health and safety of millions of Americans, and the contribution that they could otherwise make to our society. As President Bush recently stated:

> All of us agree that the gravest domestic threat facing our nation today is drugs. Drugs have strained our faith in our system of justice. Our courts, our prisons, our legal system are stretched to the breaking point. The social costs of drugs are mounting. In short, drugs are sapping our strength as a nation.

The Commission has no evidence indicating that the incidence of drug trafficking on the part of FCC licensees, or employees of licensees, exceeds that for American society generally. The Commission nevertheless regards drug trafficking as a matter of the gravest concern and intends to apply policies that reinforce both private and Government efforts to eradicate drug trafficking.

Accordingly, absent extenuating or mitigating circumstances, the Commission intends promptly to take all appropriate steps, including initiation of license revocation proceedings, where information comes to our attention that FCC licensees or their principals have been convicted of drug trafficking.[1] While our statement today is intended to apply to licensees in all FCC services and is not motivated by a concern regarding any particular service, we note that drug trafficking convictions fall within the scope of conduct the Commission may consider under existing policy in the broadcast area.[2]

In addition, licensees and permittees in all services are advised that the Commission encourages maximum possible effort on their part to stem the national problem of drug trafficking. In this regard, the adoption of drug counseling, drug education, and other similar programs by licensees and permittees is encouraged. Licensees and permittees should also prohibit the use of drugs by employees while at work.

Action by the Commission September 29, 1989, by Public Notice (FCC 89-283). Commissioners Sikes (Chairman), Quello, Dennis, Marshall and Barrett.

FEDERAL COMMUNICATIONS COMMISSION

News Media contact: Audrey Spivack at (202) 632-5050
Office of General Counsel contact: David Solomon at (202) 632-6990.

FOOTNOTES

[1] *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1217-20, 1227-28, *on reconsideration*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987).

[2] *See* 102 FCC 2d at 1197 n. 42. *See also Williamsburg County Broadcasting Corp.*, FCC 89-280, adopted September 29, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

WISCONSIN BELL, INC.

For authority pursuant to Section 214
of the Communications Act of 1934,
to discontinue service on its
broadband distribution system
in Brookfield, Wisconsin.

ORDER DENYING STAY

Adopted: Septemper 22, 1989; Released: October 12, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Paragon Cable Television, Inc. (Paragon), operator of a cable television system in portions of Brookfield, Wisconsin, has filed a petition to stay the effectiveness of the *Order and Authorization*, 4 FCC Rcd. 2238 (1989) (*Order*), issued by the Chief, Common Carrier Bureau (Bureau) pending Commission action on Paragon's application for review. An opposition has been filed by Wisconsin Bell.[1] For the reasons stated below, the motion to stay is denied.

2. By its *Order*, the Bureau granted authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to Wisconsin Bell, Inc. (Wisconsin Bell) to discontinue service on its broadband distribution system in Brookfield, Wisconsin. Wisconsin Bell stated that approval of its application would allow it to sell its broadband assets, formerly leased by Telenational Communications, Inc. (Telenational), to a new cable television franchisee, Warner Cable Communications of Milwaukee, Inc. (Warner), in order that cable television service to residents of Brookfield be continued. In a late filed petition, Paragon opposed the sale and discontinuance of service on the basis that it was interested in leasing the broadband service to provide cable television service, and/or a type of pay television service which would not rely on over-the-air service and according to Paragon, would not be subject to regulation under the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq*. Paragon lacks a currently valid franchise to provide cable service in Brookfield. The Cable Act states that a cable operator generally may not provide cable service without a valid franchise. 47 U.S.C. § 541(b)(1).[2] Wisconsin Bell's channel service tariff also requires customers to have all necessary authority to provide proposed services. The Bureau found that Paragon failed to define its proposed use of channel service, and Paragon had not in fact made use of the system in any manner and could cite no attempt to provide this service. The Bureau further found that, absent a contrary decision by the federal district court, the city's revocation of the franchise is entitled to a presumption of validity.[3] The Bureau authorized Wisconsin Bell to discontinue its above-mentioned service, finding that such discontinuance furthers the public interest of the residents of Brookfield to continue receipt of cable television service by a lawfully franchised provider.

II. REQUEST

3. Paragon argues that a stay of the authorization should be granted because the decision of the Bureau rests an incorrect interpretation of the Cable Act of 1984 and success on the merits seems assured. Paragon asserts that the decision below inflicts irreparable injury to it because it forecloses Paragon's ability to offer its pay service to Brookfield and there is no alternative means for accomplishing such an offering. Paragon notes that the stay would only delay the consummation of Wisconsin Bell's transaction. It asserts that the larger public will not be adversely affected by a stay because existing cable service can be maintained while the § 214 application is held off and, if the decision below is reversed, an additional service to the public may be expected from Paragon Cable's proposed new offering. Paragon Motion to Stay at 3.

4. Wisconsin Bell argues that Paragon's Motion to Stay is moot because Wisconsin Bell discontinued service and transferred all Brookfield broadband assets to Warner Cable before Paragon filed its motion. Wisconsin Bell Response to Paragon Motion to Stay at 1. It counters that Paragon has failed to demonstrate irreparable harm because even assuming, arguendo, that Paragon may provide its service without a franchise, those rights would clearly survive Wisconsin Bell's abandonment of service and transfer of assets to Warner Cable. Wisconsin Bell explains that Paragon can obtain such service from Warner, the new franchised cable television operator in Brookfield. *Id*. at 1-2. Wisconsin Bell states because it is no longer in a position to offer these access services, there is no necessity for this Commission to reach the question of possible carrier obligations under the § 532 Leased Access Channel provisions. *Id*. at 3.

III. DISCUSSION

5. Upon a review of the pleadings, we do not find that Paragon's showing warrants a stay of our decision. An agency must balance four factors in determining whether a stay will be granted: (1) there is a substantial likelihood that the party will succeed on the merits of its claim; (2) the party will suffer irreparable injury if the stay is not granted; (3) the injury that the party will suffer outweighs the harm to the adverse party if the stay were granted; and (4) the public interest will not be harmed if the stay is granted.[4]

6. Paragon seeks the stay of our decision in order to stop the sale of Wisconsin Bell's broadband distribution system to Warner. Paragon has failed to demonstrate that irreparable injury would occur if a stay is not granted. Paragon states that without a stay it would be irreparably harmed because it would be unable to lease channel distribution service from the successor in interest to the facilities, Warner Communications, Inc., in the same manner and under the same conditions as it could from Wisconsin Bell. Paragon Reply to Wisconsin Bell Opposition at 6. Paragon states that a cable operator like Warner is permitted by 47 U.S.C § 532(c)(1) to impose restrictions on a lessee to assure that the leased channel use will not adversely affect the cable system. *Id*. Paragon states

that when the facilities are owned by the telephone company, channel leasing may be expected to be a true common carrier offering -- "the telephone company's principal interest should be in leasing space because unlike Warner, it [Wisconsin] can afford the luxury of being completely blind to the content of the program service." *Id.* at 6-7. Wisconsin Bell argues that the obligation to provide access channels under § 532 implicates only "cable operators," and not common carriers. Wisconsin Bell Response to Paragon Motion to Stay at 3. Wisconsin states that it provided only common carrier services to the franchised cable operator, Telenational and nothing in the record suggests that Paragon ever requested any access service from Telenational.

7. Section 532 of the Cable Act requires cable operators to designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with certain requirements. 47 U.S.C. § 532 (b)(1). The term "cable operator" is defined as any person or group of persons who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system. 47 U.S.C. § 522 (4). Regardless of whether or not Wisconsin Bell is subject to the provisions of § 532 by virtue of its channel distribution service offering, or secondarily, whether because it is a common carrier it would exercise any lesser degree of content supervision, we find that Paragon cannot demonstrate irreparable harm would result if it seeks to lease service from Warner instead of Wisconsin Bell. It is well established that injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.[5] The record does not demonstrate that Warner or any other cable operator may exercise improper editorial control over Paragon. Irreparable injury is found when the harm caused by the action cannot be rectified by a later final judgment on the merits in favor of the party requesting the stay.[6] Paragon fails to acknowledge the protections afforded by 47 U.S.C. § 532 (c)(2), which significantly limit editorial control by the cable operator:

> A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

47 U.S.C. § 532(c)(2).[7] Congress has enacted a complete statutory scheme for the provision of leased access channel service, including remedies for parties who feel they have been unjustly aggrieved by cable operators under § 532.[8] Thus, Paragon has available to it an array of remedies, including actual damages, to redress any violations of § 532. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.[9] We find that Paragon has not sustained its burden of demonstrating that denial of the petition to stay would result in irreparable injury. Wisconsin's sale of its broadband facilities to Warner does not preclude Paragon from offering its as yet undefined pay television service. Assuming Paragon may provide this new service without a franchise, it may seek access to channel distribution service from Warner, from another provider, or construct its own facilities. Accordingly, there will be no irreparable injury if our Section 214 authorization remains in effect pending review.

8. The factors relating to harm to the opposing party and to the public interest also weigh against granting the stay. Denial of the stay request will not harm the public in any way, and indeed grant of a stay could harm the public interest to the extent it results in delay or disruption in delivering cable television service to the citizens of Brookfield. The city has granted a cable television service franchise to Warner and endorsed the sale of Wisconsin Bell's broadband assets to that company. There is no evidence in Paragon's pleadings that the public interest is not served by this arrangement. Without a stay Paragon may still offer its service, assuming it has one, through the new franchisee or by other means. Accordingly, we find that the harm to the City's interest far outweighs any harm to Paragon and that the public interest could be harmed if the stay were granted. Nor is Paragon likely to prevail on the merits. We have considered Paragon's objections to the sale of the facilities below and note that Paragon never offered more than a vague explanation for its intended use of the broadband service. Its vague interest in the service does not present a serious public interest argument that outweighs the desire of Telenational, Warner, and the City of Brookfield for Wisconsin Bell to discontinue service and sell the facilities to Warner, the new franchisee.

9. In conclusion, there is no showing by Paragon that granting the requested stay would further the public interest other than the suggestion that it expects to prevail on the merits. Without in any way deciding or prejudging the merits of Paragon's application for review of the Bureau's *Order* which is pending before the Commission, the request for stay of that *Order* must be denied. In light of this finding, it is not necessary to address whether Paragon's motion is moot by virtue of Wisconsin Bell's apparent transfer of the broadband channel distribution facilities to Warner.[10]

10. In view of the foregoing, Paragon has failed to meet the standards required of a petition for stay. Therefore, IT IS ORDERED, That the motion for stay filed by Paragon Cable Television, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock, Chief
Common Carrier Bureau

FOOTNOTES

[1] Although the Bureau's *Order* was released on March 9, 1989, Paragon's petition to stay was not filed until March 31, 1989.

[2] Paragon states that it was in the process of constructing a cable television system in Brookfield when the city revoked its franchise and authorized Telenational to construct in Brookfield. Paragon is contesting the legality of that revocation in a pending federal court action against the City of Brookfield. *See Paragon Cable Television, Inc. v. City of Brookfield*, Case No. 83-C-1686 (E.D. Wisc.). Wisconsin Bell states that Paragon owns its own cable and electronics within that portion of Brookfield where it operates a CATV system.

[3] In a prior case where Paragon alleged it had been improperly denied pole attachment rights, the court held that it is appropriate for the Commission to employ a presumption of validity of the city's franchise revocation while that issue is pending in federal court in Wisconsin. *See Paragon Cable Television, Inc v. F. C. C.*, 822 F.2d 152 (D.C. Cir. 1987).

[4] *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (WMATC), and *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) *(Virginia)*.

[5] *Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (1985) *(Wisconsin Gas)* citing: Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931) and *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F. 2d 977 (D.C. Cir. 1976).

[6] *Virginia* at 925.

[7] *See also*, 47 U.S.C. § 532 (d): Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available. If the court finds that the channel capacity... has not been made available in accordance with this section, or finds that the price, terms, or conditions established by the cable operator are unreasonable, the court may order such system to make available . . . the capacity sought and . . . determine the appropriate price. 47 U.S.C. §532 (d).

[8] *Id.*

[9] *Wisconsin Gas* at 674 citing *Virgina, supra.*

[10] Para. 4, *supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-438

In the Matter of

Amendment of Section 73.202(b), RM-6327
Table of Allotments,
FM Broadcast Stations.
(Yermo, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1989; Released: October 13, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 5614 (1988), issued in response to a petition filed on behalf of Robert Jason (petitioner), proposing the allotment of FM Channel 287A to Yermo, California, as that community's second local FM broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 287A to Yermo, California, since it could provide a second local FM broadcast service to the community.

3. The *Notice* stated that this proposal could be implemented in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 2.6 kilometers (1.6 miles) east of Yermo. We have since determined that Channel 287A may be sited 5.1 kilometers (3.2 miles) east.[1] Use of the latter site negates a short-spacing to the construction permit (BPH-880714NP) issued on Channel 285A at Lenwood, California.[2]

4. Since Yermo is located within 320 kilometers (199 miles) of the U.S.-Mexico border, concurrence in the proposal by the Mexican Government was obtained.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Yermo, California	251B, 287A

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. The window period for filing applications on Channel 287A at Yermo, California, will open on **November 28, 1989,** and close on **December 28, 1989.**

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates used for Channel 287A at Yermo are 34-55-18 and 116-46-22.

[2] Coordinates at the site specified in the construction permit issued to Eneida Orchard on Channel 285A at Lenwood are 34-50-00 and 117-02-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-453

In the Matter of

Amendment of Section 73.202(b), RM-6851
Table of Allotments,
FM Broadcast Stations.
(Hampton, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 13, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by Southern Arkansas Radio (petitioner), licensee of Station KKOL(FM), Channel 296A, Hampton, Arkansas, seeking the substitution of Channel 293C3 for Channel 296A, and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 293C3 can be allotted to Hampton at the petitioner's specified site 19.4 kilometers (12.1 miles) east[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 293C3 for Channel 296A at Hampton, Arkansas. In accordance with established Commission policy, we will propose to modify the Class A permit of Station KKOL(FM), as requested by petitioner, in the event Channel 293C3 is substituted for Channel 296A at Hampton, Arkansas. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 293C3 at Hampton.

4. Accordingly, in order to provide Hampton with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Hampton, Arkansas	296A	293C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 4, 1989**, and reply comments on or before **December 19, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Southern Arkansas Radio
Attn: Wayne F. Brewis
P.O. Box 1066
Hampton, AR 71744

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at the petitioner's specified site are 33-35-00 and 92-16-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-454

In the Matter of

Amendment of Section 73.202(b), RM-6839
Table of Allotments,
FM Broadcast Stations.
(El Dorado, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 13, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by William J. Wynne (petitioner), permittee of Station KLTW(FM), Channel 227A, El Dorado, Arkansas, seeking the substitution of Channel 227C3 for Channel 227A, and modification of his permit accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 227C3 can be allotted to El Dorado at the petitioner's specified site[1] 9.9 kilometers (6.1 miles) southwest of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Use of the petitioner's proposed site also clears the site designated in the construction permit (File No. 871105MD), issued to Station KISI(FM), Channel 227A, Malvern, Arkansas, at coordinates 34-23-52 and 92-52-27.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 227C3 for Channel 227A at El Dorado, Arkansas. In accordance with established Commission policy, we will propose to modify the Class A permit of Station KLTW(FM), as requested by petitioner, in the event Channel 227C3 is substituted for Channel 227A at El Dorado, Arkansas. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 227C3 at El Dorado.

4. Accordingly, in order to provide El Dorado with an additional expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
El Dorado, Arkansas	227A, 241C1, 257A, 276A	227C3,241C1 257A, 276A[2]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

William J. Wynne, Esq.
Crumpler O'Connor & Wynne
Suite 308
NBC Plaza
El Dorado, AR 71730

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's specified site are 33-09-30 and 92-45-20.

[2] Channel 277C1 has been proposed in MM Docket No. 89-85. *See* 4 FCC Rcd 3725 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-104

In the Matter of

Amendment of Section 73.202(b), RM-6645
Table of Allotments,
FM Broadcast Stations.
(Big Pine, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1989; Released: October 13, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 3951 (1988), issued in response to a petition filed on behalf of Janice D. Levin (petitioner), proposing the allotment of Channel 227B to Big Pine, California, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 227B to Big Pine, since it could provide a first local broadcast service to that community.

3. As indicated in the *Notice*, Channel 227B can be allotted to Big Pine in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Big Pine, California	227B

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 227B at Big Pine, California, will open on **November 28, 1989,** and close on **December 28, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used in this determination are 37-09-54 and 118-17-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-311

In the Matter of

Amendment of Section 73.202(b),	RM-5858
Table of Allotments,	RM-5859
FM Broadcast Stations.	RM-6136
(Virden, Rushville and Hillsboro, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1989; Released: October 13, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5157 (1987), seeking comments on two separately filed petitions for rule making. The first petition, filed by Virden Broadcasting Corporation ("Virden"), proposes substitution of Channel 259B1 for Channel 244A at Virden, Illinois, and modification of its license for Station WRVI(FM) to specify the higher powered channel. The second petition, filed by Berrey-Price Communications ("Berrey-Price") proposes substitution of Channel 244B1 for Channel 244A at Rushville, Illinois, and modification of its license for Station WKXQ(FM) to specify the higher powered co-channel. These proposals were considered together because the Rushville upgrade is contingent upon Station WRVI(FM) vacating Channel 244A at Virden. In response to the *Notice*, James M. Wextten ("Wextten") filed a counterproposal requesting Channel 259B as a new allotment to Hillsboro, Illinois.[2] Berrey-Price and Virden filed comments reaffirming their intention to apply for the respective channels, if allotted, and reply comments in response to the counterproposal. Virden filed additional reply comments. Talley Broadcasting Corporation ("Talley"), licensee of Stations WSMI(AM) and WSMI(FM), Litchfield, Illinois, filed reply comments in opposition to the counterproposal.

2. In his counterproposal, Wextten requests that the Commission allot Channel 259B to Hillsboro, Illinois, as a first aural service, rather than to Virden, Illinois, where it would be used to upgrade an existing class A station. In support of his proposal Wextten states that Hillsboro is the county seat of Montgomery County, and has a population, as reported in the 1980 U.S. Census, of 4,408 persons. He notes that Hillsboro presently has no operating station and that there is no channel allotted there, whereas there are operating stations at both Virden and Rushville. He contends that the increase in area served from the new Hillsboro allotment will be 43% more than from the upgrading of WRVI at Virden and WKXQ at Rushville, combined. Specifically, Wextten contends that the combined facilities of WRVI and WKXQ as proposed in this rule making would permit a gain in 1 mV/m service to an area of 5,800 square kilometers (2,960 square kilometers and 2,840 square kilometers, respectively), while the new Class B facility at Hillsboro would provide 1 mV/m service to an area of 8,500 square kilometers. Wextten also contends that a greater number of persons would be served by the Hillsboro allotment.

3. Virden, in response to Wextten's counterproposal, disputes Wextten's contention that there would be 43% more area served by allotting Channel 259B to Hillsboro than by upgrading station WRVI at Virden and station WKXQ at Rushville. Virden first contends that Wextten's proposal would only serve approximately fifteen to twenty percent more area than the combined upgrades. Second, Virden states that a large portion of the area which would be served by allotting Channel 259B to Hillsboro is already served with the 1 mV/m signal now provided by station WRVI and requests that this area be taken out of any percentage figures presented to the Commission by Wextten. Virden further disputes Wextten's allegation that more people would be served by the allotment of Channel 259B to Hillsboro than would be served by the upgrades of stations WRVI and WKXQ. Virden states that the approximate population gained in the proposed allotment of Channel 259B to Hillsboro in areas that are not already served by WRVI is 103,000. Virden contends that an upgrade of station WRVI from Class A to Class B1 would provide additional service to approximately 120,000 people, including the city of Springfield, Illinois. An upgrade of station WKQX would provide additional coverage to an approximate population of 95,000. Therefore, Virden concludes the additional population served by the upgraded signals of stations WRVI and WKXQ totals 215,000 versus the 103,000 that the proposed allotment of Channel 259B to Hillsboro would provide. Virden notes that Hillsboro was a community on the Docket 80-90 list for a Class A channel in 1980, that there was no expression of interest to build a station there at the time, and that the economy of the Hillsboro area is tied to other communities nearby, namely Litchfield, which has an AM/FM station that serves both Litchfield and Hillsboro.

4. In its additional comments, Virden argues that the flat terrain in the Hillsboro area allows for FM signals to travel greater distances than normal. Therefore, Virden states that a Class A facility would serve Hillsboro and surrounding area as well as a full Class B facility. Virden proposes to assign Channel 227A to Hillsboro, instead of Channel 259B, to allow both the Virden and Rushville upgrades. Virden states that if the Commission believes that first local service is important in Hillsboro, the best choice would be to allot Channel 227A to Hillsboro, while allowing Virden and Rushville to upgrade.

5. Berrey-Price, in response to Wextten's counterproposal, suggests the upgrade of Station WKXQ(FM) on Channel 243B1 to Rushville instead of Channel 244B1. Berrey-Price states that the allotment of Channel 243B1 to Rushville is not contingent upon or related to the modification of Channel 244A at Virden, Illinois. In addition, to support his need for an upgrade at Rushville, Berrey-Price states that he has experienced numerous instances of shadowing and distortion. He states that from his station's transmitter site the 90 through 180 degree radials cross the Illinois River Bluffs at distances ranging from fifteen to twenty kilometers from the tower site. At those points the average terrain drops from 50 to 65 meters into the Illinois River Valley. This causes severe shadowing, and

the phenomenon is allegedly complicated by multi-path phenomena due to the superstructures of the vehicular and railroad bridges spanning the Illinois River, grain elevators, silos, tall buildings, church steeples, radio towers, and other structures. As a result of these factors, Berry-Price states, WKXQ's signal is severely compromised so that only about 51.8% of the population within its predicted 1 mV/m service contour receives adequate service. Berrey-Price contends that if Channel 243B1 is allotted to Rushville, it would provide improved first service to Rushville. To further support his need for an upgrade, he states that no Class B1 or greater FM channel is assigned, licensed or applied for within 60 kilometers of Rushville, and no AM stations with powers greater than 1 Kw are located within 40 kilometers.

6. In opposition to Wextten's counterproposal, Talley contends that Hillsboro is 15 kilometers from Litchfield, and that the primary service contours of Stations WSMI(AM) and WSMI(FM) and the proposed Hillsboro facility would overlap. Talley states that Wextten erred in claiming that the allotment of Channel 259B to Hillsboro would provide a first local transmission service to an unserved community. Talley states that radio Stations WSMI(AM) and WSMI(FM) have provided service to Hillsboro. Talley states that should the Commission conclude that Hillsboro lacks service, and is entitled to an allotment, the Commission can allot either Channel 232A or Channel 244A to Hillsboro. Talley notes that the alternative channels provide greater public interest benefits, since they would allow two facilities to upgrade as well as the allotment of a new local service to Hillsboro. Talley contends that the number of persons that would receive service from the three facilities would exceed the service population of the Class B facility at Hillsboro by 35%.

7. After reviewing the proposals, we believe that Virden and Rushville are deserving of wide coverage FM stations, and Hillsboro deserves a first local service. However, we are unable to grant all of the requests. A staff engineering analysis reveals, that there are no other Class B or B1 channels available that would satisfy the expressed interests of each of the parties. Although there are Class A channels available at Hillsboro, no interest has been expressed in a Class A allotment there. In the absence of an expression of interest in the lower class channel, the Commission will not allot the lower class channel station. *See Pleasant Hope, Missouri*, 2 FCC Rcd 5709 (1988).[3] Therefore, our decision will be based on the allotment priorities set forth in *Revision of FM Assignment Policy and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First fulltime aural service;
(2) Second fulltime aural service;
(3) First local service;
(4) Other public interest matters
{Co-equal weight given on priorities (2) and (3)}

None of the parties submitted information demonstrating that their proposal would provide a first or second aural service. Thus, priorities (1) and (2) enumerated above do not apply. Virden is currently served by Station WRVI(FM), and Rushville is currently served by Station WKXQ(FM), therefore, no first or local service would be provided to either community. Wextten's proposal would provide the community of Hillsboro with a first local service, and would therefore fulfill priority (3). Because the Hillsboro allotment would serve a higher allotment priority, we believe it would best serve the public interest.

8. After careful consideration of the information before us, we believe that the public interest would be better served by allotting Channel 259B to Hillsboro as a first local FM service. Channel 259B can be allotted to Hillsboro, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.6 kilometers (5.7 miles) north of the city.[4]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 27, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hillsboro, Illinois	259B

10. The window period for filing applications will open on **November 28, 1989,** and close on **December 28, 1989.**

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Hillsboro has been added to the caption.

[2] Public Notice of the counterproposal was given on October 30, 1987, Report No. 1686, (RM-6136).

[3] Even if Wextten had expressed, in the alternative, an interest in a Class A channel at Hillsboro, we would have preferred the Class B allotment at Hillsboro. A staff engineering analysis found that the population that would be served by a Class B allotment at Hillsboro exceeds the combined populations in the areas of coverage that would be gained if the Rushville and Virden stations were upgraded even if the population that would be served by a Class A Hillsboro allotment is substracted from the Class B Hillsboro population served. Accordingly, the "gain area" for a Hillsboro Class B allotment better serves the public interest than the combined "gain area" for the Rushville and Virden stations.

[4] The coordinates for Channel 259B at the restricted site are North Latitude 39-14-20 and West Longitude 89-27-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-455

In the Matter of

Amendment of Section 73.202(b), RM-6915
Table of Allotments,
FM Broadcast Stations.
(Murdock, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 13, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Murdock Broadcasting (petitioner), requesting the allotment of Channel 255A to Murdock, Florida, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 255A can be allotted to Murdock in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 255A to Murdock, Florida, since it could provide the community with its first local service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Murdock, Florida	--	255A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 4, 1989,** and reply comments on or before **December 19, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Vincent A. Pepper
Neal J. Friedman
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(Attorneys for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 27-00-42 and West Longitude 82-08-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 12, 1989

SWBT'S NOTIFICATION OF ENHANCED SERVICE MARKET TRIAL (CC DOCKET NO. 88-616)

On September 15, 1989, Southwestern Bell Telephone Company (SWBT) filed a letter in this Docket notifying the Commission that it will add a voice messaging service (VMS) to its existing Houston gateway market trial. SWBT states that the VMS feature will allow end users to deliver voice messages to multiple parties at the same time and to determine the status of these messages, for example, whether they have been delivered. SWBT plans to add this VMS feature, which will only be accessible through its voice gateway trial, on November 1, 1989.

In its notification, SWBT states that it will comply with the general conditions for conducting enhanced service market trials established by the Common Carrier Bureau in its decision permitting the BOCs to conduct limited market trials of enhanced services without filing comparably efficient interconnection (CEI) plans. *(See* BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, 4 FCC Rcd 1266 (1989).)

SWBT's notification is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies of SWBT's notification can also be obtained from the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 12, 1989

AT&T AND LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

On September 29, 1989, the American Telephone and Telegraph Company and the following local exchange carriers filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs: The Ameritech Operating Companies, Bell Atlantic, BellSouth Corporation, NYNEX Telephone Companies, Rochester Telephone Corporation, Southwestern Bell Telephone Company and U S WEST. Nevada Bell, Pacific Bell and United Telephone System filed proposed revisions on October 2, 1989. The LECs filed their original manuals in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manuals no later than **November 14, 1989.** Replies should be filed by **November 30, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. CSG-89-089-P/L

Application for authority to construct and operate a multipurpose earth station at Salt Creek, California.

ORDER AND AUTHORIZATION

Adopted: October 6, 1989; Released: October 13, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on May 17, 1989 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6), (c)(7) and (c)(9) of the Communications Satellite Act of 1962, as amended, to construct and operate an international multipurpose INTELSAT Revised Standard A earth station at Salt Creek, California for the provision of international telecommunication services. The application was placed on public notice on May 24, 1989. No comments were received.

2. The proposed earth station will consist of an 18.3-meter antenna meeting INTELSAT technical parameters for Revised Standard A earth stations and communicating with INTELSAT satellites in the Pacific Ocean Region (POR). The proposed earth station will operate in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. AT&T's legal, technical and financial qualifications to construct and operate the proposed earth station are established. AT&T provides many different types of domestic and international services, including operation of several multipurpose earth stations. The proposed earth station shall conform with INTELSAT performance criteria for Revised Standard A earth stations. AT&T has completed the necessary frequency coordination.

6. Upon consideration of the application, we find that authorization of the requested facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED that application File No. CSG-89-089-P/L IS GRANTED, and AT&T is authorized to construct and operate the proposed INTELSAT Revised Standard A earth station at Salt Creek, California for the provision of international communication services.[3]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. IT IS FURTHER ORDERED that no service shall be provided via the Salt Creek, California earth station prior to grant of authority for such service pursuant to Section 214 of the Communications Act.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONESIAN TELECOMMUNICATIONS, CORP. File No. CSG-89-092-P/L

Application for authority to construct and operate a multipurpose earth station on Saipan, Northern Mariana Islands.

ORDER AND AUTHORIZATION

Adopted: October 6, 1989; Released: October 13, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 2, 1989 by Micronesian Telecommunications Corp. (MTC), requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6), (c)(7) and (c)(9) of the Communications Satellite Act of 1962, as amended, to construct and operate an international multipurpose INTELSAT Revised Standard A earth station at Susupe, Saipan in the Commonwealth of the Northern Mariana Islands (Saipan) for the provision of international telecommunication services. The application was placed on public notice on June 14, 1989. No comments were received.

2. The proposed earth station will consist of a 15.5-meter antenna meeting INTELSAT Revised Standard A technical parameters communicating with INTELSAT Pacific Ocean Region (POR) satellites. The proposed earth station will operate in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. We find that MTC has the necessary legal, technical and financial qualifications to construct and operate the proposed multipurpose earth station. MTC is a subsidiary of GTE Hawaiian Telephone Co. and is a common carrier pursuant to Section 214 of the Communications Act. MTC provides various communications services between Saipan and overseas points including the continental U.S., Hawaii and Guam. The proposed earth station shall conform with INTELSAT performance criteria for Revised Standard A earth stations. MTC has completed the necessary frequency coordination.

6. Upon consideration of the application, we find that authorization of the requested facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED that application File No. CSG-89-092-P/L IS GRANTED, and MTC is authorized to construct and operate the proposed Revised Standard A earth station with a 15.5-meter antenna on Saipan for provision of international communication services.

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activiation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

10. IT IS FURTHER ORDERED that no service shall be provided via the Standard A earth station at Susupe, Saipan prior to grant of authority for such service pursuant to Section 214 of the Communications Act.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).
[2] *Id.* at 284.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PRIVATE
TRANSATLANTIC
TELECOMMUNICATIONS
SYSTEM, INC.

Rules and Policies
Concerning Dominant Carrier
Participation in the Market
for International Submarine Cable
Transmission Facilities

RM No. 6624

ORDER

Adopted: October 6, 1989; Released: October 13, 1989

By the Chief, International Facilities Division:

1. On September 6, 1989, US Sprint Communications Company Limited Partnership (US Sprint) filed a letter with the Commission seeking permission, as owner of Private Transatlantic Telecommunications System, Inc. (PSI),[1] to withdraw PSI's petition for Rule Making in this proceeding.

2. In view of the foregoing, IT IS ORDERED that PSI's petition for Rule Making, RM No. 6624, is dismissed without prejudice pursuant to Section 1.401(e) of the Commission's Rules and this proceeding is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTE

[1] *See* Private Transatlantic Telecommunications System, Inc., 4 FCC Rcd 5077 (Com. Car. Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 13, 1989

ERRATUM TO PUBLIC NOTICE INVITING COMMENTS ON NECA et al. JOINT PETITION FOR WAIVER OF PART 36 RULES REGARDING THE UNIVERSAL SERVICE FUND

The public notice released September 21, 1989, DA 89-1144, inviting comments on the NECA *et al.* Joint Petition for Waiver of the Part 36 Rules regarding the Universal Service Fund contained a typographical error. The proposed effective date of the requested waiver should be for calendar years 1990 through 1993, instead of through 1998 as stated in the second sentence of the first paragraph.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

MONTGOMERY COUNTY MEDIA NETWORK d/b/a IMAGISTS — File No. BPCT-841129KF

CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY — File No. BPCT-841129KK

WOOD BROADCASTING COMPANY — File No. BPCT-841129KW

G-A COMMUNICATIONS, INC. — File No. BPCT-841129LE

For Construction Permit
Conroe, Texas

ORDER

Adopted: October 3, 1989; Released: October 16, 1989

By the Review Board: MARINO(Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it a "Motion to Reopen the Record or, in the Alternative, to Remand to the Presiding Officer," filed September 28, 1989 by Wood Broadcasting Company (Wood) and a "Motion to Strike" Wood's Motion, filed October 2, 1989 by Carman Matias and Andrew N. Wimbish, Jointly. In our prior order in *Imagists*, 4 FCC Rcd 3749 (Rev. Bd. 1989), *rev. dismissed*, FCC 89I-37, released June 1, 1989 (Comm'n), the Board remanded the above-captioned proceeding to the presiding Administrative Law Judge (where it is currently *sub judice)* for the issuance of a *Supplemental Initial Decision*. In light of that action, Wood's motion does not properly lie before the Board, but must be directed to the presiding ALJ.

2. ACCORDINGLY, IT IS ORDERED, That the Motion to Reopen the Record or, in the Alternative, to Remand to the Presiding Officer, filed September 28, 1989 by Wood Broadcasting Company IS DISMISSED; and

3. IT IS FURTHER ORDERED, That the Motion to Strike, filed October 2, 1989, by Carmen Matias and Andrew N. Wimbish, Jointly, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

MM Docket No. 86-55

In the Matter of

Amendment of Section 73.202(b),	RM-5161
Table of Allotments,	RM-5400
FM Broadcast Stations.	RM-5401
(Atmore, Chatom, Bayou LaBatre, Alabama, and Pascagoula, Mississippi)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 18, 1989; Released: October 3, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* in this proceeding, 51 Fed. Reg. 6442, published February 24, 1986, proposing the allotment of Channel 290A to Atmore, Alabama. WGUD Stereo, Inc., and Benchmark Communications Corporation filed counterproposals. Alabama Native American Broadcasting Company, Shelley Broadcasting Co., Inc., and Mississippi Network, Inc., filed comments. Alabama Native American Broadcasting Company, WGUD Stereo, Inc., EJM Broadcasting Company and Mississippi Network, Inc., filed reply comments. Finally, Alabama Native American Broadcasting Company, WGUD Stereo, Inc., and Benchmark Communications Corporation filed "Joint Supplemental Comments." For the reasons discussed below, we are allotting Channel 290A to Atmore, Alabama, Channel 290C3 to Pascagoula, Mississippi, and Channel 291C3 to Chatom, Alabama.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Alabama Native American Broadcasting Company ("ANABC"), proposing the allotment of a new Class A channel to Atmore, Alabama.[1] In response to the *Notice* proposing the allotment of Channel 290A to Atmore, WGUD Stereo, Inc. ("WGUD"), licensee of Station WGUD, Channel 292A, Pascagoula, Mississippi, filed a counterproposal proposing the substitution of Channel 290C2 for Channel 292A at Pascagoula, and modification of its Station WGUD license to specify operation on Channel 290C2. WGUD also included a counterproposal to allot Channel 292A to Bayou LaBatre, Alabama. In addition, Benchmark Communications Corporation ("Benchmark"), permittee of Station WCCJ, Channel 291A, Chatom, Alabama, filed a counterproposal proposing the substitution of Channel 290C2 for Channel 291A at Chatom, and modification of its Station WCCJ construction permit to specify operation on Channel 290C2.[2]

3. Shelley Broadcasting Co., Inc.("Shelley"), licensee of Station WRJM, Channel 289C, Troy, Alabama, and EJM Broadcasting ("EJM"), licensee of Station WDLT, Channel 252A, Chickasaw, Alabama, filed comments. In its comments, EJM notes that ANABC originally requested the allotment of Channel 254A to Atmore which, in turn, conflicts with its proposal to substitute Channel 254C1 for Channel 252A at Chickasaw (RM-5108). EJM asserts that the upgrade of the only station licensed to serve Chickasaw should be preferred over a proposed fourth local service to Atmore. On the other hand, EJM does not object to the proposal to allot Channel 290A to Atmore. In its comments, Shelley asserts that there is no "reasonable assurance" that a transmitter site is available for the proposed Atmore allotment that would meet the minimum spacing requirements and comply with zoning and FAA restrictions.

DISCUSSION

4. We will not consider the Benchmark counterproposal to upgrade its Channel 291A construction permit to operate on Channel 290C2. On January 19, 1989, the Audio Services Division cancelled Benchmark's underlying construction permit for Channel 291A at Chatom. As a consequence of that cancellation, Benchmark is no longer eligible to request modification of its construction permit. Moreover, in the Joint Supplemental Comments filed June 23, 1989, Benchmark agrees not to pursue the Channel 290C2 allotment. Instead, Benchmark states its willingness to apply for a Channel 291C3 allotment at Chatom as a "new facility." We also need not consider the EJM comments because they concern only the originally proposed Channel 254A proposal for Atmore. In regard to the comments by Shelley pertaining to a suitable transmitter site at Atmore, we note that ANABC is the licensee of AM Station WASG, Atmore, Alabama. The reference site for the proposed Channel 290A allotment at Atmore is the same site as the Station WASG AM facilities, which include a 506-foot tower. In view of the existing 506-foot tower, Shelley's unsupported allegations raise no substantial question as to site availability concerning zoning and FAA restrictions. Finally, we will no longer consider the proposed Bayou LaBatre allotment because the only parties expressing an interest in this allotment, Redus R. Taylor and Steve Davenport, subsequently withdrew their interests in applying for this allotment.

5. As indicated earlier, ANABC, WGUD, and Benchmark filed Joint Supplemental Comments looking toward a resolution of this proceeding.[3] Specifically, the supplemental comments propose the allotment of Channel 290A to Atmore, Channel 291C3 to Chatom, and Channel 290C3 to Pascagoula.[4] These allotments will comply with the Commission's minimum spacing requirements. We believe that the public interest would be served by the allotment of FM Channel 290A to Atmore, Alabama, and Channel 291C3 to Chatom, Alabama. We also believe that the public interest would be served by the substitution of Channel 290C3 for Channel 292A at Pascagoula, Mississippi, and modification of the Station WGUD license to specify operation on Channel 290C3.[5] Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), and

303(g) and (i) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 30, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

Community	Channel No.
Atmore, Alabama	281C, 290A
Chatom, Alabama	291C3
Pascagoula, Mississippi	256C1, 290C3

6. The window period for filing applications for the Channel 290A allotment at Atmore, Alabama, and the Channel 291C3 allotment at Chatom, Alabama, will open on **December 1, 1989,** and close on **January 2, 199.**

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WGUD, Pascagoula, Mississippi, IS MODIFIED to specify operation on Channel 290C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the counterproposal to allot Channel 292A to Bayou LaBatre, Alabama, IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Originally, ANABC requested the allotment of Channel 254A to Atmore. In order to afford the required protection to the 16-kilometer buffer zone for Class C Stations WKYD-FM, Andalusia, Alabama, and WMPO, Pascagoula, Mississippi, the *Notice* proposed Channel 290A.

[2] Public Notice for both counterproposals was given on April 22, 1986 (Report No. 5398).

[3] These parties have also filed a "Petition to Accept Joint Supplemental Comments" and a "Joint Motion to Expedite." In view of the fact that the Joint Supplemental Comments will lead to an expeditious resolution of this proceeding resulting in new FM allotments at all three communities, we hereby accept these comments.

[4] This resolution is made possible by the Commission's *First Report and Order* in MM Docket No. 88-375, 4 FCC Rcd. 2792 (1989), which created the additional class of FM broadcast station, Class C3.

[5] The reference coordinates for these allotments are: Channel 290A at Atmore, Alabama, 30-55-05 and 87-26-47, for Channel 290C3 at Pascagoula, Mississippi, 30-22-05 and 88-44-35, and for Channel 291C3 at Chatom, Alabama, 31-34-20 and 88-07-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-566

In the Matter of

Amendment of Parts 2 and 90 of the Commission's Rules to provide for stolen vehicle recovery systems — RM-6362

REPORT AND ORDER

Adopted: September 29, 1989; Released: October 16, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission is modifying Section 2.106 of its rules, the Table of Frequency Allocations, by adding footnote US312 to allocate the frequency 173.075 MHz for stolen vehicle recovery systems.[1] The Commission is also modifying Section 90.19 of its rules to provide service rules for these systems.[2] The Commission finds that this new technology offers an effective means for dealing with vehicle theft and that its authorization will significantly benefit both law enforcement agencies and the public.

BACKGROUND

2. On March 10, 1986, the Commission adopted an *Order* granting experimental authority to the Lo-Jack Corporation (Lo-Jack) and the Massachusetts' Department of Public Safety (Department) to operate and conduct a market test of a stolen vehicle recovery system in the state of Massachusetts.[3] This system is known as the Lo-Jack system.[4] Prior to that time the Department had been operating this system experimentally under the auspices of the Federal Bureau of Investigation of the U. S. Department of Justice. The Lo-Jack system operates on the frequency 173.075 MHz, which is currently allocated for Federal Government use only.

3. The Commission received petitions for reconsideration of the March 10, 1986, *Order*, from WNEV-TV, Inc. (WNEV-TV) of Boston, Massachusetts, and the Association of Maximum Service Telecasters (MST). WNEV-TV and MST requested the Commission to reconsider its action granting the experimental authorization due to potential interference to TV channel 7 operations. On October 6, 1986, the Commission, by *Memorandum Opinion and Order*, denied these petitions for reconsideration. The Commission stated that Lo-Jack's engineering analysis provided sufficient evidence that there was little risk of interference to TV reception. The Commission further noted that previous activity by Lo-Jack on 173.075 MHz had not resulted in complaints of interference.[5]

4. On March 31, 1988, Lo-Jack filed a *Petition for Rule Making*, RM-6362, (*Petition*).[6] The *Petition* requested that the Commission allocate the frequency 173.075 MHz nationwide for a new stolen vehicle recovery service and adopt appropriate service rules. Lo-Jack anticipated that the Federal Government would have no objection to the shared use of this spectrum. On August 30, 1988, National Telecommunications and Information Administration (NTIA), in its capacity as spokesman for the Executive Branch on spectrum management matters, informed the Commission that with certain conditions it would agree to the non-Government use of 173.075 MHz for stolen vehicle recovery systems on a primary basis with Government use.[7]

5. On December 12, 1988, in response to the petition filed by Lo-Jack, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) proposing to allocate the frequency 173.075 MHz nationwide for a new stolen vehicle recovery service.[8] In the *Notice*, the Commission stated that the development of stolen vehicle recovery systems would be of great benefit to law enforcement agencies and the public. It noted that the NTIA agreed to allow sharing of 173.075 MHz with non-federal government vehicle recovery systems on a co-primary basis. The Commission further stated that the likelihood of interference to TV channel 7 operations from the signals of stolen vehicle recovery system base stations on this frequency would be minimal due to the short duration of the transmissions and the low power involved. The Commission proposed to limit eligibility for stolen vehicle recovery system licenses to parties eligible for licenses in the Police Radio Service. Finally, it proposed technical standards for operation of these systems.

6. In response to the *Notice*, the Commission received 40 comments and 28 reply comments, as listed in the Appendix. These comments address several distinct areas as follows: allocation of spectrum; continued Federal Government use of 173.075 MHz; potential for interference to TV channel 7 operations in the 174-180 MHz band; eligibility for licensing; and technical standards. These matters are discussed below.

Allocation of Spectrum

7. The majority of the commenters support the proposed allocation of 173.075 MHz for stolen vehicle recovery systems. The strongest support is from the law enforcement community. Many law enforcement agencies cite statistics showing that vehicle theft is one of the fastest growing areas of crime and that it is becoming difficult to control this problem.[9] They argue that providing an allocation for stolen vehicle recovery systems will help respond to this growing problem and will benefit both the private sector and law enforcement agencies. Specifically, they argue that such systems will increase speed of recovery of stolen vehicles, reduce potential damage to stolen vehicles, and reduce the degree of danger to law enforcement officers by identifying stolen vehicles and allowing adequate protective measures to be taken.[10]

8. Law enforcement agencies argue that a single nationwide frequency is necessary and critical to the effectiveness of the system. They claim that if different frequencies are used in different areas, a thief could avoid or reduce the possibility of detection simply by driving away. On the other hand, a single nationwide frequency would provide a common channel that could support multiple and interagency operations. They argue this would facilitate

the implementation of regional stolen vehicle recovery systems.[11] Further, they assert that lack of a dedicated frequency for stolen vehicle recovery systems has been a barrier to the development of technology for vehicle recovery applications.

9. The Los Angeles Police Department offers a report from a panel of experts it established to review stolen vehicle recovery technology. The panel considered three different technologies on which stolen vehicle recovery systems could be based: cellular telephone networks; satellite systems; and radio direction finding. The panel found that cellular telephone networks currently do not incorporate technologies to provide location information and that satellite systems, while offering advantages in capacity, coverage and accuracy, are cost-prohibitive. The panel concluded that land-based radio direction finding is the only technology sufficiently mature at the present time to support law enforcement stolen vehicle recovery operations.

10. METS, a manufacturer of an alternative stolen vehicle recovery technology, endorses the Commission's proposal and suggests that the Commission's regulatory imperative should be to encourage the development of as many competing stolen vehicle recovery systems as possible. However, METS is concerned that this allocation would give Lo-Jack a marketplace advantage that could result in the practical exclusion of other systems having technologically and functionally superior features. This would be due to Lo-Jack's "head start" in the development of a vehicle recovery system for the subject frequency. METS also argues that the Commission should consider alternative frequencies. METS states that its system is used in Europe on frequencies in the 27-75 MHz range. While it does not object to the allocation of 173.075 MHz for stolen vehicle recovery systems, METS states that its experience in Europe and elsewhere suggests that other frequencies would be as appropriate or more appropriate for tracking stolen vehicles.

11. The United States Department of Justice's Federal Bureau of Investigation (FBI) filed comments objecting to the use of the frequency 173.075 MHz by stolen vehicles recovery systems. The FBI argues that this frequency has been used by the FBI on a nationwide basis and is still required to meet its needs. United States Senator Alfonse M. D'Amato of New York State filed comments in support of the FBI's position.

12. Vehicle Security Electronics, Inc. (VSE) filed comments opposing the proposed allocation. VSE suggests that a single-frequency stolen vehicle recovery system, such as Lo-Jack's, can be easily overcome by several methods, for example, jamming of the frequency. VSE indicates that other alternatives are available to deal with vehicle theft, such as "aftermarket" security products designed to prevent vehicle theft and vehicle alarm systems. Furthermore, according to VSE, a system based on use of satellites would be superior.

13. The Vehicle Security Association (VSA), which represents manufacturers, dealers, and distributors of vehicle security systems, expresses similar concerns to VSE that systems such as Lo-Jack's can be easily defeated by professional car thieves, who would simply disconnect a vehicle's transceiver. VSA suggests that satellite systems may be safer for police officers because police would not have to attend tracking devices and engage in road pursuit. It also argues that satellite systems would avoid the need for costly police car tracking equipment and transmitting towers. VSA states that one weakness of the technology used by Lo-Jack is the time delay in notifying police of the theft and then activating the vehicle transmitter. According to VSA, it is preferable to activate the vehicle transmitter immediately when a break in the vehicle's security is detected. Finally, VSA indicates that the opportunities for competition in this field will be restricted because Lo-Jack has not provided technical details of its transponders to other manufacturers.

14. Lo-Jack states that its system is deliberately designed to activate only upon receipt of a theft report in response to police concerns about false alarms. Further, Lo-Jack asserts that the Commission is not choosing a particular technology in making this frequency allocation. It maintains that the decision should be left to the law enforcement community and the public to choose among the various technologies. This is supported by APCO in its reply comments. APCO argues that both satellite-based and land-based stolen vehicle technologies should be allowed to develop concurrently, with the marketplace determining which is best. Lo-Jack notes that competitive systems can be implemented through time sharing of the single frequency.

15. *Discussion.* In the *Notice*, the Commission tried to identify alternative frequencies in this region of the spectrum that could be used for stolen vehicle recovery systems. No suitable spectrum was found that could be used on a nationwide basis. Further, there are problems with the frequency range identified by METS. The lower portion, 27-54 MHz, is subject to several technical problems including man-made "radio noise" and "skip" interference and the upper portion, 54-72 MHz, is allocated for TV broadcasting. Therefore, we see no reasonable frequency alternatives in the portion of the spectrum to accommodate stolen vehicle recovery systems on a nationwide basis.

16. With respect to the FBI's comments, NTIA was aware of the FBI's concerns prior to agreeing to use of this frequency for stolen vehicle recovery systems.[12] NTIA is now working with the FBI to identify other frequencies to meet the FBI's requirements. These arrangements should satisfy the FBI's concerns. In addition, the frequency at issue here will be used for purposes of substantial benefit to all law enforcement agencies, including the FBI.

17. We observe that the seriousness of the growing problem of car theft and associated criminal activity is abundantly clear in the record. Several of the commenters offer alarming statistics on vehicle theft and its impact. Stolen vehicle recovery systems offer the potential for help to deal with this problem.[13] Further, such systems may help reduce the risk to law enforcement officers of apprehending suspected auto thieves. We place great weight on comments filed by the various police and law enforcement organizations in support of such systems. We recognize that several different approaches to the problem of auto theft are being developed. Each has advantages and disadvantages. For example, while satellite-based systems may provide universal coverage, they may be more costly.[14] We are also cognizant that it may be possible to find ways to thwart systems operating under the proposed allocation; however, we expect this would be true to some extent for any system. In any event, it is not necessary that we determine here which stolen vehicle recovery technology is best. We agree with APCO that this is best left to the marketplace. The appropriate role for the

Commission is to provide an opportunity for the implementation of such systems. The record shows a clear and strong interest in the proposed allocation as an effective means to deal with vehicle theft. In light of the potential benefits, we find that the allocation of the frequency 173.075 MHz for stolen vehicle recovery systems is in the public interest.

18. As was stated in the *Notice*, we wish to make it clear that we are allocating spectrum for a specific type of service and not for a particular manufacturer's system or technology. We agree with Lo-Jack that competitive systems can be accommodated through time sharing of the frequency, as discussed below.

Potential Interference To TV Channel 7

19. Broadcast interests argue that use of 173.075 MHz by stolen vehicle recovery systems will cause interference to TV channel 7 broadcast operations on 174-180 MHz. They claim that the interference analysis prepared by Micrologic, Inc., for Lo-Jack's experimental license application is unique to the Massachusetts experiments and is not general enough to support a permanent, nationwide allocation.

20. The Association of Maximum Service Telecasters, Inc. (MST) in an Engineering Statement prepared by Jules Cohen argues that the Micrologic Report underestimated the potential interference to TV channel 7. Specifically, it notes that the Report was based on the median values for television receiver interference rejection characteristics. MST claims that a better criterion would be the 90 percentile TV receiver interference rejection values, so that only 10 percent of viewers would receive more interference than predicted. Further, MST notes that Micrologic's measurements were made with a horizontally polarized antenna, whereas the Lo-Jack signal is vertically polarized and such polarization discrimination will not occur in practice due to the effect of multipath propagation.[15]

21. MST also claims that the Micrologic Report conclusion that fewer than 200 households would potentially receive interference from the entire Massachusetts experiment was due to the remote locations of the Lo-Jack base stations in the Boston area. MST asserts that, of the five base stations, three were in isolated, unpopulated areas; and none were in the area between the Grade A and Grade B contour of Boston's WNEV-TV Channel 7. MST claims this is the region where the greatest likelihood of interference would be expected. Thus, MST states that the lack of interference complaints from the Massachusetts experiment cannot be used as a basis for evaluating potential interference in other areas.

22. MST argues that, if the Commission should choose to implement the proposed allocation, it should be on a secondary basis to TV service with strict control on the location of base stations. MST states that stolen vehicle recovery system base stations should be located in remote areas as was done in the case of Lo-Jack's experimental operation in Massachusetts. Further, MST contends that vehicle recovery system licensees should be required to correct any interference to TV broadcasting that may occur. Finally, MST suggests that those licensees should be required to undertake periodic surveys of the potentially affected areas. MST states that precedent for such measures exists in the FCC Rules, such as requirements for 43 MHz paging systems that call for the licensee to conduct periodic surveys of viewers to determine the extent of any interference.[16] MST also indicates that provisions similar to those governing automated maritime telecommunication system operation in the 216-220 MHz band, calling for an analysis of interference to TV channel 13 operations from coast stations, might be applied here.[17] The National Association of Broadcasters and numerous TV broadcast interests filed comments and reply comments supporting MST's position.

23. WNEV-TV, Inc. states that, contrary to Lo-Jack's claims, it has experienced interference from the experimental stolen vehicle recovery system operating around Boston. One of its engineering technicians, Mr. William A. Holbrook, states that he observed interference to the reception of WNEV-TV's video signal while situated in a TV monitoring vehicle 100 to 150 yards from a Lo-Jack base station.

24. MST and PBS also express concern about potential interference to future advanced television systems (ATV) from stolen vehicle recovery systems. They argue that even if current NTSC television is not disturbed by stolen vehicle recovery systems operations, future ATV systems may be more susceptible to interference. MST requests that action in this proceeding be held in abeyance pending the selection of a broadcast ATV system.

25. Both Lo-Jack and METS argue that the "interference test" performed by WNEV-TV's engineer was artificial and unrealistic. They note that the test was conducted at only 100-150 yards from the Lo-Jack transmitting antenna and that the WNEV-TV engineer used a high gain antenna. They argue this is not typical for home TV reception and that the test is insufficient to predict the likely effects upon TV reception. Lo-Jack points out further that WNEV-TV's tests were conducted using a professional quality television demodulator and waveform monitor and can not be considered representative of a typical TV receiver. Lo-Jack also notes that, based on the Micrologic Report, interference was predicted within 107 yards of the site where WNEV-TV performed its tests. Therefore, Lo-Jack contends it is not surprising that interference was observed.

26. Lo-Jack also challenges MST's comments as being inaccurate. In support Lo-Jack attaches an Engineering Statement of Robert A. Bednarek to its reply comments which supports the Micrologic Report. Bednarek claims that the Commission has always based interference susceptibility criteria on the median performance of receivers and not on the 90 percentile as suggested by MST. He contends that the use of a horizontally polarized receive antenna for the field strength measurements was appropriate because it is consistent with the polarization of typical outdoor television antennas. He maintains that over the very short path lengths where interference is predicted, polarization discrimination will still predominate.[18] With regard to indoor antennas, Bednarek indicates that the attenuation of the potentially interfering signal due to the building would more than compensate for the polarization discrimination. He claims that the measured field strength readings for the desired and undesired signals provided in the Micrologic Report supported the interference calculations.

27. *Discussion*. We recognize that there exists some potential for interference from stolen vehicle recovery system base stations to TV channel 7 operations.[19] We believe that this risk of interference to TV broadcasting can be made minimal. We agree with broadcast interests that careful planning of the locations of the stolen vehicle

recovery system base station transmitters is essential.[20] We concur with MST that it is appropriate to apply conditions similar to those used for automated maritime telecommunications systems (AMTS) operating in the 216-220 MHz band for controlling potential interference to TV channel 13. We are, therefore, requiring an analysis of potential interference to channel 7 TV viewers from each stolen vehicle recovery system base station located within 105 miles of a TV channel 7 transmitter.[21] Where interference is projected to more than 100 viewers at a particular site, the applicant must show that no other suitable locations are available, that a plan has been developed to correct any interference, and that adjustments to viewers' TV receivers will be made to correct any interference that results from such operations. However, the licensee must eliminate any interference to TV channel 7 reception within 30 days of notification or operation of the base station must be discontinued.[22]

28. We are not persuaded that potential, and as yet undetermined interference to ATV is sufficient reason to delay the availability of stolen vehicle recovery systems that would operate on a frequency not allocated for TV.[23] While we are committed to prompt action towards the implementation of ATV, at the same time we recognize that this process may take considerable time before it is completed. We do not believe it would be appropriate to withhold the benefits of stolen vehicle recovery systems from the public while ATV systems are being investigated.

Eligibility

29. In the *Notice*, the Commission proposed to restrict licensees of stolen vehicle recovery systems to eligibles in the police radio service. The National Association of Business and Educational Radio (NABER), VSE and VSA argue that the Commission also should allow licensing of these systems to other entities. They claim this is necessary due to a shortage of police manpower. VSE asserts that the private security industry could effectively operate a stolen vehicle recovery system on a pay-for-service basis.

30. Law enforcement interests, on the other hand, were unanimous in supporting the proposal to restrict licensing to eligibles in the police radio service.[24] In its reply comments, APCO argues that business radio service providers of vehicle monitoring systems should be allowed to sell their full range of services, but that the Commission should not mix law enforcement and business operations on a single dedicated stolen vehicle recovery system frequency.

31. The purpose of this allocation is for stolen vehicle recovery systems. Opening the band to additional eligibles, such as private entities, could make coordination between systems difficult and possibly interfere with police operations. For example, the tracking of stolen vehicles by private entities could be dangerous and interfere with ongoing police activities. Because of the highly specialized nature of the service, we will restrict use of 173.075 MHz to eligibles in the police radio service.

Technical Standards

32. In the *Notice*, we proposed to restrict transmissions by mobile units to a duty cycle of 200 milliseconds every 10 seconds. This was intended to reduce the impact of any potential interference from the mobile transmitters to TV broadcast channel 7 operations. Several commenters address this proposal. Lo-Jack states that when a police vehicle is actively tracking a stolen vehicle, it is desirable to increase the duty cycle of the mobile units to 200 milliseconds every second. METS argues that the Commission should not restrict the duty cycle on the mobile units in order to allow flexibility in system design. Further, METS contends that "off" times of greater than 2 seconds would cause significant delays in locating a transmitter. The New Jersey State Police argues that the Commission may wish to consider a more liberal duty cycle of 500 milliseconds every 10 seconds to provide increased data burst time to transmit more intelligence.

33. The New Jersey State Police interpreted the proposed duty cycle as also applying to base stations and expressed some concern that there would be insufficient time to activate a number of stolen vehicle transponders. It proposes that the Commission not put any duty cycle restrictions on base stations. The New Jersey State Police notes, however, that sufficient quiet time must be provided to allow mobile tracking receivers to lock onto a target vehicle without the interference of the base station. Lo-Jack indicates that it did not interpret the proposed duty cycle as applicable to base stations. However, Lo-Jack points out that its base stations transmit 800 milliseconds every 64 seconds. It also notes that, occasionally, longer base station transmit times of up to six seconds per minute are required when setting up and testing a base station. Lo-Jack requests that these requirements be taken into account if transmit time limitations are to be set for base station transmissions.

34. We recognize that restricting mobile unit transmissions to once every 10 seconds may increase the difficulty in locating a target vehicle. Accordingly, we are modifying our proposed rules to allow mobile units to transmit up to 200 milliseconds every second while a vehicle is being tracked actively. We believe this strikes a proper balance between the desire to reduce the interference impact on TV broadcasting and the need for more frequency transmissions when actively tracking a vehicle. We find no need at this time to accommodate longer transmission times for data bursts by mobile units.

35. With regard to base stations, we believe some restriction on duty cycle is necessary to permit multiple systems to share the single frequency that is available. At the same time, we wish to provide technical flexibility in the design of systems. We will therefore allow a total transmission time of up to 1 second per minute for each base station. This will permit adequate time for activation of a large number of target vehicle transmitters and also will permit several systems to time-share the available frequency. We will allow testing of base stations, as discussed by Lo-Jack, on a secondary basis only. Such testing must not cause interference to other stolen vehicle recovery systems.

36. Lo-Jack also requests that the proposed maximum transmit output power of the mobile units be increased from 2 watts to 2.5 watts. Lo-Jack indicates that the Massachusetts experiment initially used 2 watts, but approval was granted in 1986 to increase the output power to 2.5 watts. The 2.5 watt units were used for the experimental program. Since we are unaware of any problems from use of the 2.5 watts, and no party has raised any objections, we are permitting the higher power levels.

37. METS suggests that the Commission establish a government/industry committee of interested parties to develop standards for stolen vehicle recovery systems. These standards would cover areas such as vehicle iden-

tification numbering techniques, vehicle target transmitter/receiver compatibility, uniform protocols, compatible manufacturing standards and operational specifications. METS claims this would allow law enforcement agencies in neighboring jurisdictions to contract service from different stolen vehicle recovery systems without jeopardizing the ability of interjurisdictional tracking of stolen vehicles. VSA also supports the establishment of standards. On the other hand, Lo-Jack argues that standards are not necessary. It argues that the public will benefit by an open-entry, marketplace approach that does not stifle technological development by imposing regulatory requirements.

38. We do not believe it is necessary to require compatibility or protocol standards for stolen vehicle recovery systems at this time. Public safety interests have not expressed a need for such standards. Stolen vehicle recovery technology is relatively new, and detailed standards might tend to stifle further technological advancements. No information has been submitted on how long it would take to develop standards; however, under the circumstances it seems improbable that this could be accomplished quickly. In the meantime the public would be denied the benefits of this technology. In light of these considerations, we do not consider it necessary to require that protocol and compatibility standards be established in this proceeding. We recognize, however, that some standards may be appropriate as this industry develops to encourage interjurisdictional tracking of stolen vehicles. We urge industry groups to work towards ensuring that vehicle recovery systems are as effective as possible in retrieving stolen vehicles that are driven from one jurisdiction to another. If, as this industry grows, it becomes evident that some standards would be in the public interest, we will revisit the question of whether implementation of a standard-setting process might be desirable.

39. In the *Notice*, the Commission requested comments on whether two separate licensees could operate base stations in the same geographical area without interfering with one another and whether each license application should be coordinated by the certified coordinator for the police radio service. Lo-Jack states that two separate licensees can operate base stations in the same geographical area simply by coordinating the timing of their base station transmissions. Lo-Jack claims that coordination of the timing of transmissions can be accomplished informally between the licensees in any given area. Lo-Jack claims that no coordination is necessary between mobile units because the powers are so low that there is unlikely to be any interaction. APCO and the New Jersey State Police basically support Lo-Jack's position. However, they suggest that licensing be limited to state or regional systems to simplify the informal coordination process.

40. It appears from the comments that a formal requirement for coordination with other vehicle recovery systems is unnecessary. We will rely on each licensee to take any necessary steps to coordinate its stolen vehicle recovery system with other agencies located in the same or adjacent jurisdictions. The suggestions by APCO and the New Jersey State Police that licensing be done only for state or regional system would provide some benefits for coordination. However, we will not adopt such restrictions. We believe it is more important to allow all police radio service eligibles the freedom to chose a particular system or design.

41. As proposed in the *Notice*, we will adopt a maximum authorized bandwidth of 20 kHz and limit emissions to F1D or F2D. The procedure for obtaining a license will be the same as for other operations in the police radio service.[25]

FINAL REGULATORY FLEXIBILITY ANALYSIS

42. The Commission is adopting these new rules to provide a nationwide frequency allocation and service regulations to provide for stolen vehicle recovery systems. We believe this action will benefit the general public and law enforcement entities. The only comment received that specifically addressed the initial Regulatory Flexibility Analysis incorporated into the Commission's *Notice* pursuant to 5 U.S.C. & 603, was from VSA. It states that there is not open competition in the sale of transponders that are compatible with the Lo-Jack system and that many of the potential radio manufacturers are small businesses. As stated above, this allocation is not made exclusively for any manufacturer or system. We are adopting rules which we believe will allow for the development and marketing of competing systems as well as the development of new technology for stolen vehicle recovery systems.

43. The only alternatives to this action suggested by the commenters is to employ cellular and mobile-satellite services to satisfy needs for stolen vehicle recovery systems. As discussed above, these technologies are not always satisfactory. There are no other significant alternatives that would accomplish our stated objectives of providing a nationwide frequency allocation for stolen vehicle recovery systems.

ORDERING CLAUSES

44. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 301 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. SS 4(i), 301, and 303(r), Parts 2 and 90 of the Commission's Rules, 47 C.F.R. Parts 2 and 90, ARE AMENDED as set forth below. IT IS FURTHER ORDERED that this Order will become effective January 10, 1990. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

RULE CHANGES

45. Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation in Part 2 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106 is amended by adding footnote designator US312 to columns 4 and 5 in the 162.0125-173.2 MHz band and by adding the following footnote to the list of footnotes following the Table:

US312 The frequency 173.075 MHz may also be authorized on a primary basis to non-Government stations in the Police Radio Service (with a maximum authorized bandwidth of 20 kHz) for stolen vehicle recovery systems.

46. Part 90 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation in Part 90 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 90.19 is amended by adding the frequency 173.075 MHz to the Table of Frequencies in paragraph (d) in its appropriate location, adding limitation (31) in paragraph (e), and adding a new paragraph (f)(7) as follows:

90.19 Police Radio Service.

* * * * *

Police Radio Service Frequency Table

Frequency or band	Class of station (s)	Limitations
* * * * *		
173.075	Base or mobile	31
* * * * *		

(e) ***

(31) This frequency is subject to the provisions of Sec. 90.19(f)(5)(7).

(f) Additional frequencies available. ***

* * * * *

(7) The frequency 173.075 MHz is available for stolen vehicle recovery systems on a shared basis with the Federal Government. Stolen vehicle recovery systems are limited to recovering stolen vehicles and are not authorized for general purpose vehicle tracking or monitoring. Mobile transmitters operating on this frequency are limited to 2.5 watts power output and base transmitter are limited 300 watts ERP. F1D and F2D emissions may be used within a maximum authorized 20 kHz bandwidth. Transmissions from mobiles shall be limited to 200 milliseconds every 10 seconds, except that when a vehicle is being tracked actively, transmissions may be increased to 200 milliseconds every second. Transmissions from base stations will be limited to a total time of 1 second every minute. Applications for base stations operating on this frequency shall require coordination with the Federal Government. Applicants shall perform an analysis for each base station located within 105 miles of a TV channel 7 transmitter of potential interference to TV channel 7 viewers. Such stations will be authorized if the applicant has limited the interference contour to fewer than 100 residences or if the applicant: (i) shows that the proposed site is the only suitable location; (ii) develops a plan to control any interference caused to TV reception from the operations; and (iii) agrees to make such adjustments in the TV receivers affected as may be necessary to eliminate interference caused by its operations. The licensee must eliminate any interference caused by its operation to TV channel 7 reception within 30 days of the time it is notified in writing by the Commission. If this interference is not removed within the 30 day period, operation of the base station must be discontinued. The licensee is expected to help resolve all complaints of interference.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parties Filing Comments on Notice in Docket 88-566

1. American Trucking Associations, Inc.	ATA
2. Associated Public-Safety Communications Officers	APCO
3. Association of Maximum Service Telecasters	MST
4. California Public-Safety Radio Association	CPRA
5. Chicago Police	
6. City of Bakersfield	
7. City of Beverly Hills	
8. City of Cincinnati	
9. City of Columbus	
10. City of Culver City	
11. City of Elmonte	
12. City of El Segundo	
13. City of Glendora	
14. City of Hartford	
15. City of Little Rock	
16. City of Long Beach	
17. City of Milwaukee	
18. City of Montebello	
19. City of Omaha	
20. City of Pasadena	
21. City of Pittsburgh	
22. City of San Buenaventura	
23. City of San Diego	
24. County of Orange, California	
25. Department of Justice	DOJ
26. Kansas City Police	
27. Las Vegas Police	
28. Lo-Jack Corporation	Lo-Jack
29. Los Angeles Police	
30. METS, Inc.	METS

31. Nashville and Davidson County
32. National Association of Business and Educational Radio, Inc. NABER
33. New Jersey State Police
34. Newport Beach Police
35. Port Authority of New York and New Jersey
36. Senator Alfonse M. D'Amato
37. State of Florida Department of Highway Safety and Motor Vehicles
38. Vehicle Security Electronics, Inc. VSE
39. Vehicle Security Association VSA
40. WNEV-TV, Inc. WNEV-TV

Parties Filing Reply Comments on Notice in Docket 88-566

1. Associated Public-Safety Communications Officers, Inc. APCO
2. Association of Maximum Service Telecasters, Inc. MST
3. Burnham Broadcasting Company, L.P. Burnham
4. Capital Cities/ABC, Inc.
5. City of Dallas
6. City of NY
7. City of Oakland
8. City of Philadelphia
9. City of Tustin
10. Cox Communications, Inc. COX
11. King Broadcasting Company
12. KMGH-TV KMGH-TV
13. KOAT Television, Inc. KOAT
14. KRCR-TV KRCR-TV
15. Illinois Association of Chiefs of Police
16. Los Angeles Police
17. Lo-Jack Corporation Lo-Jack
18. METS, Inc. METS
19. National Association of Broadcasters NAB
20. Sunbeam Television Corp. Sunbeam
21. So. CA Public-Safety Regional Communications Planning Committee SCRPSCPC
22. Times Mirror Broadcasting Times Mirror
23. Vehicle Security Electronics, Inc. VSE
24. Washington State Patrol
25. WDBJ Television, Inc. WDBJ
26. WNEV-TV, Inc. WNEV-TV
27. WSAW-TV WSAW-TV
28. WSPA-TV WSPA

Ex Parte Comments

1. Allbritton Communications Company (WJLA-TV) WJLA-TV
2. KOAM-TV KOAM
3. KSPS-TV KSPS-TV

FOOTNOTES

[1] 47 CFR Section 2.106.

[2] 47 CFR Section 90.19.

[3] *See Order* in File Nos. 1562-EX-PL-85 and 1563-EX-PL-85, FCC 86-105 (adopted March 10, 1986).

[4] The Lo-Jack vehicle recovery system consists of a radio receiver-transmitter installed in a hidden location in the motor vehicle, tracking devices mounted in police vehicles and a computerized network of radio transmitters. When a vehicle equipped with a Lo-Jack device is reported stolen, the vehicle's unique identification code is transmitted on the network. When this signal is received by the stolen Lo-Jack-equipped vehicle, the transmitter portion of the device is activated and begins transmitting its identification code. The vehicle can then be tracked by specially equipped police vehicles. Mobile transmitters operate with 2.5 watts power output and base stations operate with up to 290 watts ERP. Both use F1D emissions with a maximum bandwidth of 20 kHz. Vehicle transmissions are of very short duration (approximately 200 milliseconds every 10 seconds), except that when a vehicle is tracked actively, transmissions are increased to 200 milliseconds every second. All the devices operate on the same frequency, 173.075 MHz.

[5] *See Memorandum Opinion and Order* in File Nos. 1562-EX-PL-85 and 1563-EX-PL-85, FCC 86-424 (adopted October 6, 1986).

[6] *See Petition for Rule Making*, RM-6362, filed March 31, 1988, by the Lo-Jack Corporation.

[7] *See* letter dated August 30, 1988, from Mr. William D. Gamble, Deputy Associate Administrator, Office of Spectrum Management, NTIA, to Mr. William Torak, Deputy Chief, Spectrum Engineering Division, Federal Communications Commission. NTIA agreed to the non-Government use of 173.075 MHz for stolen vehicle recovery systems subject to the following restrictions: a) Federal Government agencies will be allowed to continue to use the channel as they have in the past, *i.e.*, for any operations consistent with the NTIA Manual. Note that there are Government operations already on this frequency which must be taken into account; b) A footnote must be added to the National Table of Frequency Allocations that would provide for the FCC to authorize this frequency on a primary basis to state and local law enforcement agencies for vehicle location and recovery systems.

[8] *See Notice of Proposed Rule Making* in Gen. Docket No. 88-566, 3 FCC Rcd 7195 (1988).

[9] For example, the City of El Sequndo's Police Department states that the state of California experienced over 205,000 vehicle thefts and that this equates to an economic impact of $820 million statewide. The Chicago Police Department states that in Chicago, car theft increased 13.4% in 1988 over 1987. The City of Omaha states that it has experienced a 24% increase over this same period. The Kansas City, Missouri, Police Department advises that the city suffered a $29 million economic loss as a result of auto theft. The Florida Highway Patrol states that vehicle thefts in Florida for 1987 were up 16.4% over 1986, and the economic impact was estimated in excess of $408 million.

[10] *See*, for example, comments of the Associated Public-Safety Communications Officers.

[11] *See*, for example, comments of the California Public Safety Radio Association.

[12] *See* letter dated February 27, 1989, from Alfred C. Sikes, Assistant Secretary for Communications, United States Department of Commerce, to Dennis R. Patrick, Chairman, Federal Communications Commission.

[13] Lo-Jack states in its comments that the Massachusetts test has a recovery rate of about 95% with an arrest rate of about 25% which compares to an arrest rate of about 9% for crimes of this sort in the Northeastern region.

[14] We are unaware of any satellite-based stolen vehicle recovery systems currently in commercial operation. However, it appears feasible that existing or planned satellite systems could be used for this application.

[15] Cohen notes that measurements were also made in vertical polarization, but not at a sufficient number of points to ensure maximum readings.

[16] *See* 47 CFR Section 22.501(a)(5). These provisions call for a semi-annual survey of possible interference with television and video reception in the geographical area within a two-mile radius of the base station.

[17] *See* 47 CFR Sections 80.215(h) and 80.475. These provisions call for an analysis to be conducted for each base station to show that no more than 100 viewers may potentially receive interference. If the interference is not so limited, the applicant must show that the proposed location is the only suitable location; develop a plan to control any interference to TV reception within the Grade B contour from its operations; and, agree to make such adjustments in the TV receivers affected as may be necessary to eliminate interference caused by its operations. Further, the licensee must correct interference within 90 days of notification by the FCC.

[18] The Micrologic Report showed interference radii ranging between 0.038 mile and 0.96 mile for each of the base stations used in the Massachusetts experiment.

[19] In 1986 and 1989 the Commission's Field Operations Bureau's Boston Office measured the effect of the transmissions from a Lo-Jack base station on WNEV-TV Channel 7. Although we do not rely on these measurements, we note that they confirmed that interference could occur at the distances predicted by Lo-Jack and the other commenters.

[20] The concerns about interference are associated with the stolen vehicle recovery system base station transmitters and not the mobile transmitters. This is because the mobile units operate at considerably lower power *(i.e.,* about 2.5 watt output for mobiles vis-a-vis 300 watts ERP for base stations), operate intermittently, and are often in motion so that interference, if it should occur, is transient.

[21] We are not requiring viewer surveys of interference because the interference risk here is not as great as for 43 MHz paging systems. Forty-three MHz paging systems can cause interference to a TV receiver's intermediate frequency (IF) amplifier. Such interference is far more difficult to determine because many variables are involved, such as the routing of the antenna cable and orientation of the TV receiver cabinet relative to the interfering signal.

[22] For guidance on how to perform such analyses we refer to our earlier study on AMTS interference to TV broadcasting. *See* R. Eckert, *Guidance for Evaluating the Potential for Interference to TV from Stations of the Inland Waterways Communications Systems,* FCC/OST TM 82-5 (July 1982). The methodology in this report is similarly appropriate for analysing interference to TV channel 7 from operations on 173.075 MHz, except that it does not specify a TV receiver protection ratio for 173.075 MHz. However, we note that the Micrologic Report provided median protection ratios for just perceptible interference of + 8 dB city-grade service (-25 dBm), + 9 dB for Grade A service (-45 dBm), and + 11 dB for Grade B service (-65 dBm). These values appear to be reasonable.

[23] At this time we do not anticipate that ATV systems will require greater out-of-band interference protection than currently exists. In any event, if the need arises to provide greater out-of-band interference protection for ATV systems, this issue would need to be addressed for numerous radio services that now operate in bands adjacent to the existing television bands.

[24] *See,* for example, comments of Port Authority of New York and New Jersey.

[25] *See* 47 CFR Part 90 Subpart G.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-460

In the Matter of

Amendment of Section 73.202(b), RM-6982
Table of Allotments,
FM Broadcast Stations.
(Minneapolis, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 2, 1989; Released: October 16, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Ruby J. Hoeflicker (petitioner), requesting the allotment of FM Channel 224A to Minneapolis, Kansas, as that community's first FM broadcast service. Petitioner filed information in support of the proposed allotment and indicated her intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 224A can be allotted to Minneapolis, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Minneapolis, Kansas, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Minneapolis, Kansas		224A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 7, 1989,** and reply comments on or before **December 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Tom W. Davidson
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 224A are 39-07-30 and 97-42-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-461

In the Matter of

Amendment of Section 73.202(b), RM-6881
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 2, 1989; Released: October 16, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Brian Mitchell Rowland (petitioner), permittee of Station WKXJ(FM), Channel 260A at Lafayette, Florida, requests the substitution of Channel 260C2 for Channel 260A at Lafayette and the modification of his construction permit (BPH-870729MJ) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 260C2 for Channel 260A at Lafayette, Florida. Channel 260C2 can be allotted to Lafayette in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.8 kilometers (12.9 miles) southeast to accommodate petitioner's desired transmitter site.[1]

3. As requested, we shall also propose to modify petitioner's construction permit to specify operation on Channel 260C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Lafayette or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested persons.

4. In view of the fact that Lafayette could receive a wide coverage area station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lafayette, Florida	260A	260C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 7, 1989,** and reply comments on or before **December 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Peter Gutmann
Neal J. Friedman
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 260C2 at Lafayette are North Latitude 30-18-21 and West Longitude 84-03-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-61

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Strasburg, Colorado)	RM-6521

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1989; Released: October 16, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 2295 (1989), issued in response to a petition filed on behalf of Express Communications (petitioner), proposing the allotment of FM Channel 272A to Strasburg, Colorado, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 272A to Strasburg, Colorado, since it could provide a first local broadcast service to the community.

3. As stated in the *Notice*, this proposal can be implemented in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 10.4 kilometers (6.5 miles) southeast[1] of Strasburg, to avoid short-spacing to Station KTRR(FM), Channel 273C2, Loveland, Colorado.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 30, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Strasburg, Colorado	272A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 272A at Strasburg, Colorado, will open on **December 1, 1989,** and close on **January 2, 1990.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the restricted site for Channel 272A at Strasburg are 39-39-37 and 104-15-25.

[2] Coordinates at the licensed site of Station KTRR(FM) are 40-27-19 and 104-55-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-462

In the Matter of

Amendment of Section 73.606(b), RM-6852
Table of Allotments,
TV Broadcast Stations.
(Colorado Springs, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 16, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of the University of Southern Colorado (petitioner), licensee of noncommercial educational Station KTSC-TV, Pueblo, Colorado, requesting the allotment of UHF television Channel 66 to Colorado Springs, Colorado, as that community's first noncommercial educational television service, and reservation of the channel for noncommercial educational use. Petitioner states that it will apply for the channel, if allotted.

2. Colorado Springs (population 215,150),[1] seat of El Paso County (population 309,424), is located approximately 100 kilometers (60 miles) south of Denver, Colorado.

3. A staff engineering analysis has determined that Channel 66 can be allotted to Colorado Springs consistent with the minimum distance separation requirements specified in Sections 73.610 and 73.698 of the Commission's Rules, provided the transmitter is sited at least 2.9 kilometers (1.8 miles) south[2] of the community to avoid shortspacing to Station KUBD(TV), Channel 59, Denver, Colorado.[3]

4. There is a temporary freeze on the filing of petitions for new allotments and applications for vacant allotments where the community is located within the minimum co-channel distance separation to certain metropolitan areas. The freeze was imposed pending the outcome of an inquiry into the uses of advanced television systems (ATV) in broadcasting. *See Notice of Inquiry*, 2 FCC Rcd 5125 (1987), and *Order*, 52 FR 28346, July 29, 1987. Nothwithstanding, the Commission also indicated that it will consider waiver requests on a case-by-case basis for noncommercial educational channels, or for petitions or applications which provide compelling reasons why the freeze should not apply to their particular situation. *See Order, supra*, at paragraph 2. The proposed allotment of Channel *66 to Colorado Springs falls within the "freeze" parameters to Denver, Colorado, one of the affected markets. However, the petitioner's request to allot Channel *66, if granted, could provide Colorado Springs with its first noncommercial service. Therefore, we will waive the freeze to the extent that we will consider petitioner's allotment proposal. If the allotment is made, however, a separate waiver will be required for the acceptance of applications.

5. Since the proposal could provide a first local noncommercial television service to Colorado Springs, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with regard to that community, as follows:

	Channel No.	
City	Present	Proposed
Colorado Springs, Colorado	11, 13, 21	11, 13, 21, *66

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 12, 1989,** and reply comments on or before **December 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Wayne Coy, Jr., Esq.
Cohn and Marks
1333 New Hampshire Ave., NW
Suite 600
Washington, DC 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] Coordinates used for Channel *66 are 38-48-26 and 104-48-51.

[3] Coordinates at the licensed site of Station KUBD(TV) are 39-40-31 and 104-52-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-463

In the Matter of

Amendment of Section 73.202(b), RM-6896
Table of Allotments,
FM Broadcast Stations.
(Boyce, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 16, 1989

By the Chief, Allocations Branch:

1. At the request of Trinity Broadcasting Corporation (petitioner), licensee of Station KBCE(FM) at Boyce, Louisiana, the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 272C3 for Channel 272A at Boyce, and the modification of Station KBCE(FM)'s license to specify operation on the higher class co-channel. Petitioner states it will apply for the higher powered channel, if allotted.

2. Channel 272C3 can be allotted to Boyce in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner, which is located 5.7 kilometers (3.5 miles) east of the city.[1] As requested, we shall propose to modify the license for Channel 272A at Boyce to specify operation on the higher class co-channel, Channel 272C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Boyce.

3. In view of the fact that the area surrounding Boyce, Louisiana, could receive expanded coverage, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Boyce, Louisiana	272A	272C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 7, 1989,** and reply comments on or before **December 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robert G. Allen, Esquire
Denise B. Moline, Esquire
Broadcast Media Legal Services
P. O. Box 1667
Manassas Park, VA 22111
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 31-22-21 and 92-36-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-464

In the Matter of

Amendment of Section 73.202(b), RM-6859
Table of Allotments,
FM Broadcast Stations.
(Lynchburg, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1989; Released: October 16, 1989

By the Chief, Allocations Branch:

1. CRS Communications, Inc. (petitioner), licensee of Station WXYU(FM), Channel 269A at Lynchburg, Virginia, has filed a petition for rule making requesting the substitution of Channel 269C3 for Channel 269A at Lynchburg, and the modification of its station's license to specify operation on the higher class co-channel, as that community's first expanded FM service. Petitioner states it will apply for the higher powered channel, if allotted.

2. Channel 269C3 can be allotted to Lynchburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) east of the community.[1] As requested, we shall propose to modify Station WXYU(FM)'s license to specify operation on the higher class co-channel, Channel 269C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Lynchburg.

3. In view of the fact that Lynchburg, Virginia, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lynchburg, Virginia	252A, 261A, 269A, 290A	252A, 261A 269C3, 290A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 7, 1989,** and reply comments on or before **December 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jerry V. Haines, Esquire
Edward A. Yorkgitis, Jr., Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates specified by the petitioner are 37-25-37 and 78-55-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-91

In re Applications of

JBD INCORPORATED File No. BPH-851114MG

LINDA F. McCULLEY File No. BPH-851115NF

For Construction Permit for a New
FM Station on Channel 243A
in Harrogate, Tennessee

Appearances

Harry F. Cole, Esq. on behalf of JBD Incorporated; *Stanley G. Emert, Jr., Esq.* on behalf of Linda F. McCulley; and *Charles Dziedzic, Esq.* and *James W. Shook, Esq.* on behalf of Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: October 5, 1989; Released: October 16, 1989

PRELIMINARY STATEMENT

1. The competing applications of JBD Incorporated ("JBD") and Linda F. McCulley ("McCulley") were designated for hearing in this proceeding to select a permittee to construct and operate a new FM radio station on Channel 243A at Harrogate, Tennessee. *Hearing Designation Order* (DA 88-259), 3 F.C.C. Rcd 1675, released March 23, 1988, and published at 53 Fed. Reg. 10,423 (March 31, 1988).[1]

2. Testimony on the comparative issues was taken on November 29 and November 30, 1988. Issues added against McCulley resulting from evidence uncovered in the comparative hearing[2] was set for June 12, 1989, and later reset for July 20, 1989, at the request of counsel. *See Order*, FCC 89M-1093, released April 6, 1989. A Joint Motion To Suspend Procedural Dates filed on June 29, 1989, was granted in order to consider settlement. *See Order*, FCC 89M-1785, released July 3, 1989. The Phase II hearing was cancelled. *Id.* On June 29, 1989, the parties filed a Joint Petition For Approval Of Settlement Agreement And Dismissal Of Application. On July 2, 1989, JBD filed a Motion For Summary Decision on the issue of whether a previous unapproved settlement payment in this case was in violation of the Communications Act. On July 12, 1989, the Bureau filed Consolidated Comments On Joint Petition For Approval Of Settlement Agreement And Dismissal Of Application And Motion For Summary Decision ("Bureau Comments"). No responsive pleading was filed by McCulley.

3. The Joint Petition and Agreement contemplate the dismissal of McCulley's application in return for a payment from JBD in the amount of $15,000. The parties have provided declarations establishing that they did not file their respective applications for the purpose of reaching a settlement. Subject to the resolution of the issue added against JBD, the Bureau has no objection to JBD receiving the grant or in the contemplated cash payment to McCulley.

FINDINGS OF FACT

4. On May 31, 1988, a Joint Request For Approval Of Agreement was rejected by the Presiding Judge because a settlement fee had been exchanged between former applicant Donald Lee Miracle and Verlan Lee Gray ("Miracle/Gray") and the principal of JBD. It was an apparent unauthorized settlement payout. *See Order*, FCC 88M-1660, released May 31, 1988. Miracle/Gray was ordered to show cause why an appropriate issue should not be added. *Id.* JBD filed a Statement In Response To Order on June 24, 1988, but Miracle/Gray filed nothing. Miracle/Gray also did not appear at the prehearing conference of May 26, 1988, to explain its conduct or to participate in the case as an applicant. Also, Miracle/Gray was later ordered to pay a $6,000 hearing charge if they intended to continue as parties in this case. *See Addendum*, Mimeo No. 3959, released June 3, 1988. No fee was paid.

5. For a failure to show cause, it was ordered by the Presiding Judge, *sua sponte*, that the following issue be added against Miracle/Gray:

> To determine whether Donald Lee Miracle and Verlan Lee Gray violated §311(c) of the Communications Act of 1934 by receiving $10,000 in a settlement before receiving Commission approval and what effect that action has on their qualification to become Commission licensees.

Miracle/Gray also was dismissed as a party for their failure to pay and prosecute. *See Memorandum Opinion and Order*, FCC 88M-2430, released July 28, 1988.

6. The basic facts are established by competent evidence. William J. Stephens ("Stephens"), an officer and director and the sole voting shareholder of JBD, testified that he gave a $10,000 check to Gray before notices of appearance were due in order to induce Miracle/Gray to withdraw their application. (Tr. 107-08, 130.) Miracle/Gray did not submit the $6,000 hearing fee with their notice of appearance on April 13, 1988 and, as stated above, the Presiding Judge dismissed their application for failure to prosecute. However, JBD and Miracle/Gray did not submit their agreement until May 6, 1988. (JBD Exh. 3., Tr. 112.) The settlement agreement was not approved. *Order*, FCC 88M-1660, released May 31, 1988. Stephens testified that he did not know that any of his actions relating to the payment to Miracle/Gray could constitute a violation of the Communications Act or of the Commission's rules. (Tr. 108, 113-14.) Also, Stephens did not discuss the payment with counsel before he made it but only brought it to counsel's attention at some undetermined time after Miracle/Gray failed to pay the required hearing fee. (Tr. 109, 116-17.) His testimony is accepted.

7. On November 30, 1988, JBD undertook to search for records relating to Stephens' testimony in lieu of requiring the testimony of JBD's counsel. Pursuant to *Order*, FCC 88M-4118, released December 2, 1988, JBD filed on December 16, 1988, a Status Report on the prospects for additional hearing testimony and whether a conference was desired in order to resolve questions of proof. JBD informed the Presiding Judge that it had located several pertinent documents and that it had submitted copies of them to the Bureau. The documents referenced by JBD, a photocopy of the cancelled check evidencing the $10,000 payment by JBD to Miracle/Gray and a declaration from JBD's counsel, were submitted as attachments to JBD's motion for summary decision. The documents are consistent with the testimony.

CONCLUSIONS OF LAW

8. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, JBD has the burden of establishing that summary decision would be appropriate based on its papers. *See Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, JBD has not met its burden.

9. Section 311(c) of the Communications Act of 1934, as amended, requires that a contract of settlement not be effectuated until the applicants have received Commission approval. Specifically, the Act provides:

> If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

47 U.S.C. §311(c)(1). Here the facts are not in dispute. Stephens paid money to Miracle/Gray pursuant to an agreement that was not approved. Thus, he effectuated the agreement without prior Commission approval. That unauthorized action does not invalidate the contract between JBD and Miracle/Gray, which is a matter of state contract law. But the settlement agreement cannot be effectuated until the applicants have received Commission approval. *Ninety-Two Point Seven B'Casting, Inc.*, 55 Radio Reg 2d (P&F) 607, 610-611 (Comm'n 1984). Thus, aside from any intention to violate the law, it was an unlawful act for JBD to effect a settlement with Miracle/Gray before it was approved by the Presiding Judge.[3]

10. However, the fact of the violation does not preclude making a grant to JBD for the evidence does not establish that there was an intentional illegal act by JBD. Moreover, the violation was voluntarily disclosed to the Presiding Judge thus countering any suggestion that Stephens may not hereafter comply with the law. The credible evidence establishes that Stephens unwittingly and without consulting counsel paid Miracle/Gray $10,000 to dismiss at a time when Miracle/Gray would find it in their interest to dismiss. In that way, Miracle/Gray would have the use of JBD's $10,000 payoff plus the savings of the $6,000 hearing fee for a total incremental alternative investment asset of $16,000. Under these circumstances it made sound business sense to complete the deal forthwith. There is no counterveiling evidence from which a motive or intent to circumvent the Communications Act could be shown or reasonably inferred.

11. The alternative to making a grant to JBD would be to indefinitely defer an award of the construction permit thereby possibly depriving Harrogate of a new service. First, the case would be returned to a trial status so that JBD could litigate the issue if it demands a hearing. Second, if JBD cannot qualify for the grant it would no longer have an incentive to litigate the added character issues against McCulley. The Bureau could litigate those issues in the absence of JBD. But it would take considerable time and resources and based on the strength of the evidence proferred in support of the issues added against McCulley, the outcome could very well result in a finding that McCulley is not qualified to receive a license. In that event, the outcome of such costly litigation would result in a deprivation of a broadcast facility to Harrogate's detriment after a considerable investment of Commission resources.

12. Therefore, because of the absence of any intent on the part of JBD to violate the law, and the fact that JBD came forward and admitted the wrongful conduct, and because of the additional circumstance of there being only one other applicant which faces qualifying issues in a Phase II hearing, the public interest favors an award to JBD under the proposed settlement. The Bureau concurs in that result. *See* Bureau Comments at 6-7. In a similar case where the Commission was presented with a settlement " *fait accompli*, " the Commission found that "no useful purpose would be served by designating the instant application for hearing or by imposing administrative sanctions -- -." *Music Productions, Inc.*, 1 Radio Reg 2d (P&F) 30, 36 (Comm'n 1963). The Presiding Judge agrees with the Bureau that this isolated violation of the Act does not suggest that JBD is unwilling or incapable of complying with the Act and the Commission's rules and regulations. *Character Policy Statement*, 102 F.C.C. 2d 1179 (Comm'n 1986). Since JBD's disqualification would not be warranted, JBD is found to qualify to receive the grant.

SETTLEMENT

13. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See* Oak *Television of Everett, Inc., et al.*, 93 F.C.C. 2d 926, 52 Radio Reg. 2d (P&F) 995 (Review Bd. 1983).

14. In this case, JBD is found to be qualified to construct and operate an FM station. The Joint Petition was filed timely in accordance with §73.3525. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Also, the Bureau has no objection to approving the settlement. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules.

15. There has been compliance with the local publication requirements of the Commission's rules. 47 C.F.R. §73.3594(g). Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources. And the settlement will ensure that a new FM service will be delivered to Harrogate, Tennessee at an earlier date. Accordingly, it is appropriate that the proposed settlement be accepted.

RULINGS

IT IS ORDERED that the Motion For Summary Decision filed on July 6, 1989, by JBD Incorporated IS DENIED.

IT IS FURTHER ORDERED that the Joint Petition For Approval Of Settlement Agreement And Dismissal of Application IS GRANTED and the Settlement IS ACCEPTED.

IT IS FURTHER ORDERED that the application of Linda F. McCulley (File No. BPH-851115NF) IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of JBD Incorporated (BPH-851114MG) for a construction permit for a new FM station on Channel 243A at Harrogate, Tennessee IS GRANTED.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Two prior applications were dismissed before the case was designated for hearing: New South Communications Ltd. and Harrogate Broadcast Group, Inc. Another applicant, Donald Lee Miracle and Verlan Lee Gray was dismissed for a failure to prosecute. *See Memorandum Opinion and Order*, FCC 88M-2427, released July 28, 1989. The circumstances of that dismissal and a related unauthorized settlement are discussed below.

[2] *See Memorandum Opinion and Order*, FCC 89M-313, released January 30, 1989 (failure to disclose broadcast interests, real party-in-interest, misrepresentations concerning letter on McCulley's financing).

[3] There is a public interest issue that is integral to each settlement. Also, it must be determined whether the application was filed for the purpose of achieving settlement in which case the settlement could not be approved. Therefore, there is no discretion to authorize even an unwitting payout on an unapproved settlement. *See* §311(d)(3) of the Act and 47 C.F.R. §73.3525(a) (agreements for removing application conflicts).

[4] Since summary decision was denied, this case is not being terminated under that remedy. However, the acceptance of the settlement, the dismissal of the only other competing applicant with prejudice, and the award of the construction permit to JBD moots the outstanding issues for purposes of this case. Therefore, it is terminated by agreement of the parties on the issuance of this ruling.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HOME TELEPHONE COMPANY

Request for Emergency Temporary
Waiver of the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

ORDER

Adopted: October 2, 1989; Released: October 4, 1989

By the Chief, Common Carrier Bureau:

1. In an Order released May 31, 1989,[1] the Chief, Common Carrier Bureau, granted Home Telephone Company (Home Telephone)[2] a three and one-half month extension of time in which to complete equal access conversion.[3] As a result, Home Telephone was scheduled to complete equal access conversion by September 30, 1989.

2. On September 28, 1989, Home Telephone filed a request for an emergency temporary waiver of the Commission's equal access implementation requirements to allow it an additional month, from September 30 until October 31, 1989, to complete conversion. In support of this request, Home Telephone states that it cannot complete the conversion process as scheduled because all company resources and manpower have been assigned to restore basic service to those areas that suffered destruction from Hurricane Hugo. Home Telephone states that it has notified all of the interexchange carriers (IXCs) affected by this delay, and that all of them find an extension of one month acceptable.

3. The Commission's *ITC Equal Access Order*[4] contemplates that special circumstances may warrant independent telephone company conversion schedules that are longer than the standard three-year timetable.[5] Thus, the Order includes a waiver provision for those independent telephone companies that "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[6] The Commission's rules also provide for the grant of waivers upon a showing of good cause.[7]

4. We find that Home Telephone has shown good cause for grant of the additional time that it seeks for completion of equal access implementation. The need to devote resources to repairing damage caused by Hurricane Hugo so that basic service can be restored clearly justifies the brief additional period requested by Home Telephone for conversion to equal access. We also note that all the affected IXCs view a one month extension as acceptable.

5. Accordingly, IT IS ORDERED, that the request of Home Telephone Company for an emergency temporary waiver of our equal access implementation requirements for one month through October 31, 1989, is GRANTED.[8]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In the Matter of Rock Hill Telephone Company and Home Telephone Company, and The Chester Telephone Company, Requests for Temporary Waiver of the Commission's Equal Access Implementation Plan for Independent Telephone Companies, 4 FCC Rcd 4588 (1989).

[2] Home Telephone is a certificated local exchange carrier providing service in certain areas of South Carolina.

[3] Telecommunications Systems, Inc. (TSI) is the interexchange carrier that requested equal access service from Home Telephone. TSI was subsequently purchased by SouthernNet.

[4] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[5] The Commission has also found that a more rapid implementation schedule may be required in certain circumstances. *See* In the Matter of Petition of MCI Telecommunications and GTE Sprint Communications Regarding the Validity of Connecticut Statute and Decisions of the Connecticut Department of Public Utility Control Relating to Unauthorized Intrastate Traffic, 1 FCC Rcd 270 (1986), at paras. 34-39.

[6] *See ITC Equal Access Order* at para. 50.

[7] Section 1.3 of the Commission's Rules, 47 CFR § 1.3.

[8] This action is taken pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 CFR §§ 0.91(h) and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY

Petition for Waiver of Comparably
Efficient Interconnection Requirements
of Third Computer Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 1989; Released: October 6, 1989

By the Chief, Common Carrier Bureau:

1. On August 18, 1989, the American Telephone and Telegraph Company (AT&T) filed a Petition[1] requesting waiver of the comparably efficient interconnection (CEI) requirements established in the *Computer III* proceeding[2] as applied to its offering of DIAL IT 900 Service Call Count Arrangements. In this Order, we grant AT&T temporary authority to continue offering the 900 Service Call Count Arrangement without CEI pending action on their Petition.

2. The Bureau recently ruled that the Call Count Arrangement is an enhanced service because it involves the provision of "additional, different, or restructured information[3] . . . ." Thus, AT&T must detariff its Call Count Arrangement offering, and provide this service in accordance with the CEI requirements established in the *Computer III* proceeding.

3. AT&T requests expeditious action waiving the CEI requirements for its DIAL IT 900 Call Count Arrangement or, in the alternative, temporary authority to continue offering this service without CEI pending action on the Petition. In support of this request, AT&T states that it cannot reasonably provide enhanced service providers (ESPs) with CEI to the basic services underlying the existing Call Count Arrangement because the hardware and software for the service are integrated into AT&T's 4ESS switch. As a result, AT&T states that there is no interface between the basic and enhanced functions which would allow AT&T to separate them and offer only the basic service capabilities to an ESP wishing to provide its own enhanced Call Count service.

4. Section 1.3 of the Commission rules[4] requires a showing of good cause for grant of a waiver. An applicant must demonstrate that the rule is not in the public interest when applied to its particular case, and further, that grant of the waiver will not undermine the public policy served by the rule[5]. We find that AT&T has shown good cause for a temporary waiver of the Commission's CEI requirements as applied to its DIAL IT 900 Call Count Arrangement. Such a waiver will prevent possible disruption of this service, which AT&T has offered for approximately nine years, and avoid customer inconvenience. As a result, we hereby grant AT&T's request for temporary authority to continue offering Call Count Arrangement service without CEI pending action on the merits of AT&T's petition.[6]

5. Accordingly, IT IS ORDERED, that AT&T's request for a temporary waiver to allow the continued provision of Call Count Arrangement service without CEI pending a decision on the merits IS GRANTED[7], subject to the conditions established herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In the Matter of American Telephone and Telegraph Company, Petition for Waiver of Comparably Efficient Interconnection Requirements of Third Computer Inquiry.

[2] *See* Amendment of Sections 64.702 of the Commission's Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom. California v. FCC*, No. 88-7183 (9th cir.) (pet. for rev. filed May 13, 1988).

[3] AT&T 900 DIAL IT Services and Third Party Billing and Collection Services, 4 FCC Rcd 3429 (1989).

[4] 47 C.F.R. § 1.3.

[5] *See* WAIT RADIO v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[6] AT&T states that if the requested waiver is granted, it will nonetheless provide the service in conformity with our requirements concerning the allocation of joint and common costs, protection of customer proprietary network information, disclosure of network interconnection information, and filing of nondiscrimination reports. Grant of this waiver is subject to AT&T's compliance with these safeguards.

[7] This action is taken pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (h), 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

METRO MOBIL COMMUNICATIONS, INC. File No. 23311-CD-P/L-01-87

For authority to construct and operate base stations in the Public Land Mobile Service on frequencies 152.66 and 152.78 MHz at North Scituate, Kingston, Pawtucket and Bristol, Rhode Island

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1989; Released: October 16, 1989

By the Chief, Mobile Services Division:

1. The New England Telephone and Telegraph Company (NET) has filed a petition to deny the captioned application of Metro Mobil Communications, Inc. (Metro Mobil). In its captioned application, Metro Mobil requests authority to construct base stations to operate on frequencies 152.66 MHz and 152.78 MHz at North Scituate, Kingston, Pawtucket and Bristol, Rhode Island. Responsive pleadings have been filed.

I. BACKGROUND AND CONTENTIONS

2. NET operates the co-channel Station KCA671 located in Waltham, Massachusetts, a facility in the same general area proposed to be served by Metro Mobil. NET argues that the Bristol facility proposed in Metro Mobil's application will cause electrical interference to NET's Station KCA671.

3. Specifically, NET argues that Metro Mobile failed to demonstrate interference-free operation and that Metro Mobile's study uses estimated data with no regard to specific terrain conditions. NET contends that field testing is needed to measure the full scope of interference to NET's existing system. In addition, NET argues that Metro Mobil's interference analysis did not take into account the fact that NET has operated an extended mobile telephone service in the area for more than twenty years and that Metro Mobil's proposed system will interfere with NET's extended service area.

4. In opposition, Metro Mobil states that its co-channel interference studies demonstrate that no harmful interference will result to NET's Station KCA671. Metro Mobil further avers that NET is not entitled to protection beyond its 37 dBu service contour and that NET failed to allege facts that sustain its argument that the pertinent terrain is irregular. In addition, Metro Mobil states that it properly conducted its co-channel interference study in accordance with sound engineering methodologies.

II. DISCUSSION

5. Based on our review of Metro Mobil's proposals, we conclude that these proposals will not cause harmful electrical interference to NET's protected 37 dBu service contours. First, we have examined the interference studies submitted with Metro Mobil's application, and have determined that the studies were conducted in accordance with Section 22.504 of the Rules and the Carey Report.[1] Both these studies, and an interference analysis conducted by the staff, confirm that Metro Mobil's proposed North Scituate, Kingston and Bristol, Rhode Island facilities will not cause electrical interference to NET's existing system.[2] Second, NET has not demonstrated the existence of any unusual terrain characteristics in the area of the proposed facilities to justify its conclusion that specific terrain conditions, and not the Carey Report, must be utilized in calculating interference. Finally, we find that NET has not submitted any measurements to establish that is is entitled to protection in an expanded area beyond the predicted Carey contour. Thus, NET's argument that Metro Mobil must protect the extended mobile service contour is without merit. The Commission stated in *Public Notice*, Mimeo No. 30893 (released May 2, 1980), that it will protect the service contour as determined by using a Carey Report analysis.[3] *See Ram Communications*, 3 FCC Rcd 3545 (Mob. Serv. Div. 1988).

6. In view of the foregoing, we find Metro Mobil to be legally, technically, and otherwise qualified to construct and operate the proposed facilities, and we further find that a grant of its application will serve the public interest, convenience and necessity.

III. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of Metro Mobil Communications, Inc. File No. 23111-CD-P/L-01-87 IS GRANTED.

8. IT IS FURTHER ORDERED that the petition to deny filed by New England Telephone and Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service," Carey, Roger B. (released June 24, 1964).

[2] On September 9, 1987, Metro Mobil amended its application changing the pattern for the North Scituate site to show that the proposed antenna will be mounted on the face of the tower structure, changing the longitude provided for the Kingston site, which originally contained a typographical error, and changing the antenna specified for the Bristol site to conform the pattern to the pattern initially specified by Metro Mobil. We find that these amendments presented by Metro Mobil are minor in

nature and that no harmful interference will be caused to NET's station KCA671 from Metro Mobil's amended proposed facilities.

[3] In Public Notice, Mimeo No. 30893 (released May 2, 1980), we stated that, under these cicumstances, we will grant the construction permit subject to the following conditions:

1. The granted facility shall not cause co-channel electrical harmful interference.

2. Prior to the start of service tests, the grantee shall inform the objecting party of the date of commencement of these tests. Should the objecting party wish to conduct tests for interference, both parties must keep each other informed of their plans in this regard and shall cooperate in the actual testing.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-367

In the Matter of

Amendment of Section 73.202(b),	RM-6221
Table of Allotments,	RM-6530
FM Broadcast Stations.	
(Selma and Georgiana, Alabama)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 17, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 4653 (1988), issued in response to a request filed on behalf of Holder Communications Corp. (Holder), licensee of Station WDXX(FM),[2] Channel 261A, Selma, Alabama, proposing the substitution of Channel 261C2 for Channel 261A and modification of its license to specify operation on Channel 261C2. Petitioner filed comments in support of the proposal. Alabama Broadcasting Service Company (ABSC) filed comments and a counterproposal[3] seeking to allot Channel 262A at Georgiana, Alabama, as that community's first local broadcast service. No other comments were received.

2. The proposals are mutually exclusive since the two communities are separated by less than the required minimum distance of 105 kilometers (65 miles) between first adjacent Class A and C2 allotments. Since the Selma proponent seeks to modify its facilities in accordance with the provisions of Section 1.420(g) of the Commission's Rules, utilizing its present site,[4] we conducted a channel search to determine the availability of an alternative channel at Georgiana. As a result, we have determined that Channel 299A is available to Georgiana, and can be allotted in conformity with the Commission's Rules, provided the transmitter is sited at least 2.3 kilometers north[5] of the community.

3. In view of the above, we believe the public interest would be served by substituting Channel 261C2 for Channel 261A at Selma as that community's third wide coverage area FM service, and by allotting Channel 299A to Georgiana as that community's first local broadcast service. We simultaneously modify the license of Station WDXX(FM) to specify operation on Channel 261C2.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 4, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED as follows:

City	Channel No.
Georgiana, Alabama	299A
Selma, Alabama	261C2, 265C2, 287C2

5. The window period for filing applications for Channel 299A at Georgiana, Alabama, will open on **December 5, 1989,** and close on **January 4, 1990.**

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Holder Communications Corp. for Station WDXX(FM), Selma, Alabama, IS MODIFIED effective **December 4, 1989,** to specify operation on Channel 261C2 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Georgiana has been added to the caption.

[2] Formerly Station WTUN-FM.

[3] Public Notice of the counterproposal was given October 7, 1988, Report No. 1752.

[4] Coordinates at the licensed site of Station WDXX(FM) are 32-26-02 and 87-00-40.

[5] Coordinates used for Channel 299A at Georgiana are 31-39-31 and 86-44-22. The site restriction is required to avoid a short-spacing to the construction permit issued to Station WPFM(FM), Channel 300C, Panama City, Florida, at coordinates 30-25-20 and 85-42-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-599

In the Matter of

Amendment of Section 73.202(b),	RM-6501
Table of Allotments,	
FM Broadcast Stations.	
(Salem, Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 17, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 790 (1989), issued in response to a petition filed on behalf of Gary Albarez (petitioner), proposing the allotment of FM Channel 250A to Salem, Indiana, as that community's second local FM broadcast service. Supporting comments were filed by the petitioner and by James T. Ledford. No other comments were received.

2. We believe the public interest would be served by allotting Channel 250A to Salem, Indiana, since it could provide a second local FM broadcast service to the community.

3. As stated in the *Notice*, Channel 250A can be allotted to Salem, Indiana, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 6.3 kilometers (3.9 miles) northwest[1] of the community to avoid short-spacing to Station WAMZ(FM), Channel 248C1, Louisville, Kentucky.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 4, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Salem, Indiana	250A, 255B

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 250A at Salem, Indiana, will open on **December 5, 1989,** and close on **January 4, 1990.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the restricted site are 38-38-13 and 86-09-47.

[2] Coordinates at the licensed site of Station WAMZ(FM) are 38-03-49 and 85-43-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-459

In the Matter of

Amendment of Section 73.202(b), RM-7009
Table of Allotments,
FM Broadcast Stations.
(Giddings, Cameron, Centerville,
Edna and Hearne, Texas)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: October 2, 1989; Released: October 17, 1989

By the Chief, Allocations Branch:

1. At the request of Radio Lee County (petitioner), licensee of Station KGID(FM), Channel 268C2, Giddings, Texas, we consider herein a petition for rule making and amendments thereto, proposing the substitution of Channel 268C1 for Channel 268C2 at Giddings and the modification of its station's license to specify the higher class channel. In order to expand the current FM service at Giddings, petitioner also requests channel substitutions at four other Texas communities. First, petitioner requests the substitution of Channel 232A for Channel 267A at Cameron, Texas, and the modification of the construction permit for Station KJKS(FM) at Cameron. Second, petitioner requests the substitution of Channel 276A for Channel 232A at Hearne, Texas, and the modification of the license of Station KHRN(FM) at Hearne. Third, petitioner requests the substitution of Channel 285A for vacant but applied for Channel 269A at Edna, Texas.[1] Fourth, petitioner requests the substitution of Channel 290A for vacant Channel 276A at Centerville, Texas. Petitioner states it will construct the higher powered station, if authorized.

2. Petitioner further states that an agreement has been reached with Joseph Kent Smitherman ("Smitherman"), the permittee of Station KJKS(FM) at Cameron, for acceptance of "any potential site restriction" placed on its facilities as a result of this proposal. In support of its claim, petitioner included a copy of the letter from Smitherman attesting to his endorsement of the proposal.

3. Channel 268C1 can be substituted for Channel 268C2 at Giddings consistent with the Commission's minimum distance separation requirements at the site specified by the petitioner,[2] provided channel changes are made at Cameron (Channel 232A for Channel 267A), Centerville (Channel 290A for Channel 276A), Edna (Channel 285A for Channel 269A) and Hearne (Channel 276A for Channel 232A). The proposed channel changes at Cameron, Centerville, Edna and Hearne can be accomplished at the existing sites of the present allotments.[3] Therefore, we are issuing a *Show Cause Order* to Freckles Broadcasting Corp., the licensee of Station KHRN(FM) at Hearne, seeking comments as to why its license should not be modified to specify operation on Channel 276A in lieu of Channel 232A. It is not necessary for such a show cause order to be issued to Station KJKS(FM) at Cameron, in view of the fact that Smitherman has consented to the changes in his station.

4. Commission policy requires that the petitioner reimburse Stations KHRN(FM) and KJKS(FM) for the reasonable costs of changing its frequency. Petitioner states its willingness to reimburse each station accordingly.

5. As requested, we shall propose to modify the license of Station KGID(FM), Channel 268C2 at Giddings to specify operation on Channel 268C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Giddings.

6. In view of the fact that Giddings could receive expanded FM coverage, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Cameron, Texas	267A, 280C2	232A, 280C2
Centerville, Texas	276A	290A
Edna, Texas	269A	285A
Giddings, Texas	268C2	268C1
Hearne, Texas	232A	276A

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Freckles Broadcasting Corp., licensee of Station KHRN(FM), Channel 232A, Hearne, Texas, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 276A in lieu of Channel 232A.

8. Pursuant to Section 1.87 of the Commission's Rules, Freckles Broadcasting Corp., may not later than **December 8, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Freckles Broadcasting Corp., to furnish additional information. If Freckles Broadcasting Corp., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Freckles Broadcasting Corp., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Freckles Broadcasting Corp.
3917 Old Oaks
Bryan, TX 77801

Joseph Kent Smitherman
P. O. Box 832
Cameron, TX 76520

Robert M. Mason
1943 Greenview
Northbrook, IL 60062

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **December 8, 1989,** and reply comments on or before **December 26, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Don Werlinger
Broadcast Development Group
7819 Manassas Drive
Austin, TX 78745
(Consultant to petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on

behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Robert M. Mason ("Mason") is the sole applicant for Channel 269A at Edna, Texas (BPH-890111MF). We note that Channel 285A can be used at the site specified in Mason's application. We shall serve a copy of this *Notice* on the applicant.

[2] Although the upgrade at Giddings requires the petitioner to relocate its station's present transmitter site at least 21.6 kilometers (13.4 miles) south of the city, the petitioner specifies a site 48.2 kilometers (30.0 miles) southwest of the city, at coordinates 29-55-00 and 97-20-00.

[3] The coordinates for Channel 232A at Cameron are 30-57-00 and 96-54-07. The coordinates for Channel 290A at Centerville are 31-15-36 and 95-58-42. The coordinates for Channel 285A at Edna are 28-57-32 and 96-37-30. The coordinates for Channel 276A at Hearne are 30-51-07 and 96-34-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 20, 1989

Released: September 20, 1989

David J. Kaufman, Esq.
Brown Finn & Neitert, Chartered
Suite 660
1920 N Street, N.W.
Washington, D.C. 20036

Helen E. Disenhaus, Esq.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Re: Cellular Radio MSA Market 232,
Eau Claire, Wisconsin

Dear Mr. Kaufman and Ms. Disenhaus:

This letter responds to the petitions for reconsideration filed August 30, 1989 on behalf of your clients, R.B.C. Cellular Enterprises, Inc. (R.B.C.) and Dawursk Partnership (Dawursk). R.B.C. and Dawursk each seek reconsideration of the Managing Director's determination that they made a prohibited oral *ex parte* presentation to Commission staff in the above-referenced proceeding. *See* Public Notice, Mimeo No. 3807 (Man. Dir. released July 28, 1989). In addition, each seeks a determination that even if a violation of the *ex parte* rules occurred, no sanctions should be imposed. Finally, petitioners request that action in this matter be taken expeditiously.

The undisputed facts include the following. On or about January 5, 1989, counsel for R.B.C., the tentative selectee for the Eau Claire, Wisconsin non-wireline cellular authorization, and counsel for Dawursk, the second-ranked applicant in the non-wireline lottery for that market, met with Commission staff. Among the matters orally communicated to the staff by counsel for R.B.C. and Dawursk were the following: (1) R.B.C. continued to believe itself qualified to receive the authorization but was pessimistic about its chances of so convincing the Commission in a timely manner; (2) R.B.C. and Dawursk were "on the verge of" entering into a settlement agreement that they believed would expedite introduction of service to Eau Claire and eliminate the delay engendered by the pending "Crossville" investigation; (3) under the settlement agreement being considered by R.B.C. and Dawursk, R.B.C. would dismiss its application, but only if Dawursk became the top-ranking applicant, i.e., that a previously-filed request to dismiss Dawursk's application not bar its becoming the top-ranked applicant; (4) under the Commission's precedent, rules and policies, it would be "correct" to make Dawursk the first-ranked applicant as contemplated by the settlement agreement; and (5) "the general view that a grant of the Dawursk application would be in the public interest. . . ." *See, e.g.*, Dawursk Pet. at 15 and Att. 3. *See also* Memorandum to the Managing Director from Myron Peck and David Siehl, July 12, 1989.

This proceeding became restricted upon the issuance of a Public Notice of the filing of mutually exclusive applications (or actual notice thereof), which occurred long before the oral communications at issue here. *See* 47 C.F.R. § 1.1208(c)(1)(i)(C). In the absence of any action modifying the *ex parte* rules, *ex parte* presentations are prohibited while the proceeding is pending. 47 C.F.R. §§ 1.1200, 1.1208(a). While the *ex parte* rules have been modified with respect to written presentations in non-wireline cellular proceedings involving numerous mutually exclusive applications, *see, e.g.*, Public Notice, No. CI-89-210, Mimeo No. 3573 (Mob. Serv. Div. July 11, 1989); R.B.C. Pet. at 6; Dawursk Pet. at 10-12, the rules have not been modified with regard to oral *ex parte* presentations.[1] Accordingly, oral presentations in this proceeding may be made only after advance notice to the parties and an opportunity for them to be present.[2] 47 C.F.R. §§ 1.1202(a) & (b). If the oral communications by R.B.C. and Dawursk were directed to the merits or outcome of the proceeding, they thus constituted a violation of the *ex parte* rules.[3] We conclude again that at least some of the communications by R.B.C. and Dawursk were directed at the merits or outcome of the proceeding and therefore constituted prohibited *ex parte* presentations. The statement that R.B.C. continued to believe itself qualified to receive the authorization addressed the merits of its then-pending application. Similarly, the statement that grant of the then-pending Dawursk application would be in the public interest also addressed the merits of that application. Finally, the statements regarding the advantages of the contemplated settlement agreement (expediting service to the public and removing the "Crossville" issue), the terms on which such a settlement would be forthcoming (only if the Commission did not treat Dawursk's applications as dismissed) and the parties' view that it would be appropriate for the Commission to facilitate the settlement agreement by treating Dawursk's application as first-ranked and not dismissed also all addressed the merits or outcome of the proceeding. *See generally Russell H. Carpenter, Jr., Esq.*, 3 FCC Rcd 6141, 6142 (Man. Dir. 1988), *clarified*, Oct. 17, 1988 (Man. Dir.) (oral *ex parte* communication regarding proposed settlement agreeement held to be directed to the merits or outcome of the proceeding).[4] Finally, we note that even if the presentations were viewed as falling within the exemption set forth in 47 C.F.R. § 1.1204(b)(7), an argument not raised here, R.B.C. and Dawursk failed to comply with the disclosure requirements of that exception. *See* 47 C.F.R. § 1.1204(b) Note.

The question of possible sanctions for these *ex parte* violations has been raised before the Common Carrier Bureau in connection with Dawursk's application (File No. 52953-CL-P-232-A-86). We therefore do not address here the question of whether the violations in question would merit the imposition of sanctions.

Accordingly, the above-referenced petitions for reconsideration are denied.

Sincerely,

Alan R. McKie
Acting Managing Director

FOOTNOTES

[1] The fact that oral *ex parte* presentations may have been made in one other cellular radio proceeding, *see* Dawursk Pet. at 13, is not evidence that the Commission has modified its *ex parte* rules regarding oral presentations. Rather, it simply suggests the possibility of other violations, an issue not now before us.

[2] Both RBC and Dawursk claim that all "interested" parties were either at or aware of the meeting. R.B.C. Pet., Kaufman Decl. at 1; Dawursk Pet. at 5. The *ex parte* rules, however, require that *all* parties have an opportunity to attend a meeting at which oral *ex parte* presentations are made, not just those whom the presenters believe have a chance of being selected. 47 C.F.R. § 1.1202(b). The fact that a party is not selected first in the lottery does not mean its application is no longer pending. *Compare* Dawursk Pet. at 14.

[3] R.B.C. argues that it would "be virtually impossible" for the consent of the over 300 mutually exclusive applicants to have been obtained before the meeting. The rule, however, requires only advance notice to the parties and an opportunity to be present, 47 C.F.R. § 1.1202(b), which could have easily been accomplished if R.B.C. or Dawursk had requested the staff to issue a public notice regarding the meeting at the same time it requested the meeting.

[4] The fact that the presentations here were made by parties rather than a non-party as in *Carpenter*, *see* R.B.C. Pet. at 6; Dawursk Pet. at 13-14, is not a meaningful distinction. Similarly, we find no significance in the fact that "the communications occurred in the context of disclosure, not concealment," i.e., that the parties brought to the Commission's attention the prior request that Dawursk's application be dismissed and the effect dismissal could have on the possibility of a settlement agreement being reached. *See* Dawursk Pet. at 2; *see also id.* at 15-16. Oral *ex parte* presentations in restricted proceedings are barred, regardless of whether the presentations involve an applicant bringing potentially damaging information to the Commission's attention, as may have been the case, at least in part, here. Finally, the fact that portions of the discussion may have been procedural or status inquiries, *see* Dawursk Pet. at 14-15, does not alter the fact that at least some aspects of the conversation addressed the merits, as discussed above.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-96

In the Matter of

Amendment of the Commission's Rules
Relative to Allocation of the
849-851/894-896 MHz Bands

ORDER DENYING EXTENSION OF TIME FOR REPLY COMMENTS

Adopted: October 5, 1989; Released: October 6, 1989

By the Office of Engineering and Technology:

1. McCaw Cellular Communications, Inc. (McCaw) has filed a *Motion for Extension of Time* requesting that the time for filing reply comments to the late-filed comments of the Goeken Group Corporation (Goeken Group) to the *Notice of Proposed Rule Making* in the above-captioned proceeding be extended for three weeks.

2. An *Order Accepting Late-Filed Comments (Order)* in this proceeding was released on August 30, 1989.[1] The *Order* established a reply comment date to the Goeken Group comments of October 9, 1989.[2] McCaw states that the Goeken Group inadvertently did not serve McCaw a copy of its late-filed comments, and that by the time McCaw had obtained a copy (September 21, 1989), it was too late for it to properly analyze this material and file reply comments in a timely manner. McCaw also states that additional time is required due to the schedules of its engineering and economic consultants. It therefore requests an extension of time to file reply comments until October 31, 1989.

3. The Commission is anxious to expedite this proceeding. While McCaw did not enjoy the benefit of being served a copy of the Goeken Group's comments, we note that there is no legal requirement for parties to be served copies of comments filed by other parties. The *Order* was released by the Commission and published in the Federal Register well over a month in advance of the reply comment filing deadline. Therefore, we believe that sufficient advance notice of the reply comment deadline was given even to parties who were not served copies of the Goeken Group's comments. We further believe that the schedules of McCaw's consultants is insufficient reason to extend the filing deadline. Accordingly, IT IS ORDERED, that the *Motion for Extension of Time* filed by McCaw Cellular Communications, Inc., IS DENIED.

4. This action is taken pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 USC Sections 154(i), 302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

FOOTNOTES

[1] The *Order* was also published in the Federal Register on August 30, 1989. *See* 54 FR 37,699.

[2] Inasmuch as this date falls on a Federal Government holiday, reply comments are actually due on October 10, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 88-536

In re Applications of

WILLIAMSBURG COUNTY BROADCASTING CORP.	File No. BPH-871008MC
Augusta Radio Fellowship Institute d/b/a SOUTH CAROLINA RADIO FELLOWSHIP	File No. BPED-871008MS

For Construction Permit for a New FM Station in Kingstree, South Carolina
Channel 231A (94.1 MHz)

ORDER

Adopted: September 28, 1989; Released: October 10, 1989

By the Commission:

1. We have taken notice of the Order by which the officer presiding over this proceeding added hearing issues to determine whether Williamsburg County Broadcasting Corp. (Williamsburg) is qualified to be a Commission licensee in light of the felony conviction of its 51 percent owner, Gregory Knop, of a conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. FCC 89M-387, released February 7, 1989. In particular, we have taken notice of Judge Chachkin's statement that Williamsburg's application for renewal of its license for WKSP(AM), Kingstree, South Carolina, was recently granted by the Mass Media Bureau. Judge Chachkin directed these facts to the Commission's attention because they "would appear to have a bearing on Williamsburg's fitness to retain [its AM] license." FCC 89M-387 at 2 n.1.

2. The Commission is empowered by 47 U.S.C. § 312(a)(2) to revoke any station license "because of conditions coming to [its] attention . . . which would warrant it in refusing to grant a license or permit on an original application . . . ." We believe that the felony drug conviction of Williamsburg's principal, Gregory Knop, raises questions regarding Williamsburg's qualifications to remain a Commission licensee. We believe that felony convictions of this type fall within the scope of conduct that the Commission may consider under the *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *on reconsideration*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987). Thus, felony convictions not involving fraudulent misconduct are relevant to character qualifications if "there is a substantial relationship between the criminal conviction and the applicant's proclivity to be truthful or comply with the Commission's rules and policies".[1] *Id.* at 1197 ¶ 37.

3. In light of these facts, the Commission is considering issuing an order to show cause why Williamsburg's license for WKSP(AM) should not be revoked, which would be consolidated with the FM proceeding. Therefore, pursuant to the procedure specified in 47 C.F.R. § 1.89, and consistent with the provisions of 5 U.S.C. § 558(c), we request Williamsburg and all other parties to this proceeding, including the Mass Media Bureau, to comment on the advisability of issuing an order to show cause why Williamsburg's license for WKSP(AM) should not be revoked and consolidating such an inquiry with the instant proceeding.

4. ACCORDINGLY, IT IS ORDERED, That Comments SHALL BE FILED within 15 days after the release of this Order and that Reply Comments may be filed within 10 days thereafter.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] In addition, if Williamsburg were found to have misrepresented facts or lacked candor in connection with the drug conviction, *see* FCC 89M-387 at 1, such a determination would also be relevant to its qualifications to remain a Commission licensee.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Revisions to F.C.C. Tariff No. 1 — Transmittal No. 1758

ORDER

Adopted: October 5, 1989; Released: October 6, 1989

By the Chief, Common Carrier Bureau:

1. On August 25, 1989, AT&T Communications (AT&T) filed revisions to its Tariff F.C.C. No. 1, to increase the Additional International Discount from 12 percent to 15 percent for AT&T's Hospitality Network Service (HNS). On September 11, 1989, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject AT&T's revisions; on September 21, 1989, AT&T filed a reply. Transmittal No. 1758 is currently scheduled to become effective on October 9, 1989.

2. Sprint argues that AT&T's inclusion of HNS in the PRO service category is incorrect, that HNS belongs in the "Other Switched Services" category, and that this misclassification merits rejection of the tariff revisions. Sprint states that AT&T's asserted "PRO Family Services" category does not exist, and that HNS does not fit in the PRO I, II, and III service category as the categories are set forth in Section 61.42(b)(3) of the Commission's Rules, 47 C.F.R. § 61.49.[1] Sprint urges the Commission to direct AT&T to correct this misclassification and to recompute its PRO and Other Switched service band index (SBI) values.

3. AT&T replies that Sprint's objection does not meet the threshold standard required by Section 1.733(a)(1)(iv) of the Commission's Rules, 47 C.F.R. § 1.733(a)(1)(iv), for rejection of tariff revisions filed under Section 61.49. AT&T states that within-band tariff revisions filed under Section 61.49(b) are deemed lawful unless the petitioner demonstrates that the required support information has not been provided, or the petitioner has made a four-part showing of probable unlawfulness of the tariff, absence of harm to other parties if the tariff were suspended, irreparable injury if the tariff is not suspended, and that suspension would not be contrary to the public interest. AT&T argues that it has provided the requisite information under Section 61.49(b), and that Sprint has not made the four-part showing necessary to support rejection. Further, AT&T asserts, even if the Additional International Discount demand associated with HNS were included in the "Other Switched" service category, the filing would be a within-band, below-cap filing.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff is so patently unlawful as to warrant rejection.[2]

5. Accordingly, IT IS ORDERED that the petition filed by US Sprint Communications Company Limited Partnership to reject tariff revisions filed by AT&T Communications of its Tariff F.C.C. No. 1, in Transmittal No. 1758, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Sprint asserts that HNS has different terms and conditions from PRO services, a different rate structure, a different target market, and separate rates and charges.

[2] However, it appears that Sprint is right in asserting that HNS belongs in the Other Switched Services category. Based on existing actual price index (API) level for Basket 3, and the existing service band index (SBI) level for the Other Switched Services category, an increase in the HNS Additional International Discount appears to constitute a within-band, below-cap change, and is thus presumed lawful. Thus, while we are denying the petition to reject AT&T Transmittal 1758, we direct AT&T to recalculate its Pro America service band index to exclude HNS, and to recalculate its Other Switched category service band index to include HNS. AT&T should also make whatever adjustments to the API level for Basket 3 are necessary to accommodate HNS in the Other Switched Services category. As noted, this will have no effect on the lawfulness of the tariff, but will assure AT&T's compliance with the Commission's price cap rules. We also note that AT&T, in its reply, states that the revenue associated with the Additional International Discount for Software Defined Network (SDN) services is calculated as part of the Pro America service band index. The Additional International Discount associated with SDN should be reflected in the SDN service band index. We therefore direct AT&T to correct its SBI calculations to reflect the exclusion of the international discount for SDN from the Pro America category, and to include the discount in the SDN category.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access
Tariff Filings

ORDER

Adopted: September 29, 1989 Released: September 29, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 15, 1989, GTE Service Corporation and its affiliated domestic telephone operating companies (GTOCs) filed a motion for stay of the refund requirement the Commission imposed upon the GTOCs and other local exchange carriers (LECs) in 1988.[1] The GTOCs seek to stay payment of their portion of the refund until the Commission and the United States Court of Appeals for the District of Columbia Circuit have completed final review of the *December 27 Order*.[2] The American Telephone and Telegraph Company (AT&T) filed an opposition to the GTOCs' motion for stay.

II. BACKGROUND

2. On October 2, 1987, the LECs filed their annual 1988 access tariffs. Many of these filings consisted of decreases, as well as increases, for various access rates. In the *Annual 1988 Access Order*, we instituted an investigation pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and suspended the special access tariffs of several of the carriers because of certain apparent discrepancies between their cost and demand showings. [3] We elected not to establish an accounting order of the kind permitted under Section 204(a). In the *December 27 Order*, the Commission found that various LECs, including the GTOCs, had overstated their revenue requirement for various investment and expense categories and had computed disallowances from the base case revenue requirement that was used to compute 1988 access rates. The Commission ordered the LECs to remedy these errors by either reducing the current rates to reflect these disallowances, reducing rates for the 1989-1990 access period to reflect these disallowances, or refunding the amount of the disallowances directly to interexchange carriers or other persons who paid the access charges.

3. By letter dated January 6, 1989, the GTOCs informed the Commission that they had elected to make direct refunds of the disallowances after computing their final actual earnings for 1988, and would issue the appropriate refunds by check or credit.[4] Shortly thereafter, on January 27, 1989, the GTOCs filed a petition for reconsideration of the *December 27 Order*, challenging the Commission's authority under the Communications Act to order refunds in the absence of a finding that the GTOCs' 1988 access rates were unjust and unreasonable.[5] The GTOCs also asserted that the Commission was precluded from ordering refunds because it had not entered an accounting order at the outset of its investigation and because the GTOCs' 1988 rates, in many instances, represented decreases from previous rate levels.[6]

4. In the *Reconsideration Order*, the Commission rejected the GTOCs' challenges to its authority to order refunds. The Commission also reaffirmed its prior findings with respect to the GTOCs' improper flowback of excess deferred taxes. However, the Commission limited its refund directive for those tax expenses to the portion of the disallowance that was attributable to increases by the GTOCs in their 1988 switched traffic sensitive and special access rates.[7] The Commission determined that the GTOCs must refund $7.347 million.[8] The GTOCs now seek to stay the payment of this amount.

III. PLEADINGS

5. The GTOCs argue that they have satisfied the legal requirements for grant of their motion for stay. According to the GTOCs, we must determine whether: (1) the GTOCs are likely to prevail on the merits; (2) without a stay, the GTOCs will suffer irreparable injury; (3) issuance of a stay will harm substantially other interested parties to this proceeding; and (4) the public interest favors granting of the stay.[9] The GTOCs assert that they can satisfy the first element of the waiver test simply by raising serious legal questions with regard to the *December 27 Order*.[10] The GTOCs claim they will suffer irreparable injury if they are required to commence payment before their appeals have been exhausted, since the Commission does not have a mechanism for the recovery of refunds once they have been issued.[11] In contrast, the GTOCs continue, interested parties will not be harmed from any delay in the issuance of the refund. They explain that those customers entitled to refunds will still receive them if the GTOCs do not prevail on appeal. Finally, the GTOCs argue that the public interest would be served by maintaining the status quo.[12]

6. In the alternative, the GTOCs assert that the Commission could use its equitable discretion to delay the effective date of the refund order. The GTOCs state they would be willing to place $7 million in an interest bearing escrow account until the litigation is completed.[13]

7. AT&T argues that the GTOCs' motion fails to satisfy the prerequisites for a stay as set forth in *Virginia Jobbers*. AT&T claims the GTOCs are not likely to prevail on the merits because they have already conceded their failure to flow back excess deferred taxes, as well as the correctness of the Commission's calculation of the resulting disallowance.[14] Although, AT&T continues, the GTOCs have challenged the Commission's legal authority to order refunds insofar as the 1988 access rates reflected decreases from prior rates, the refunds for which the stay is sought are limited to those resulting from increases in the GTOCs' access rates. Therefore, AT&T concludes there is no basis for postponing further the GTOCs' obligation to return these overcharges to its access customers.[15] AT&T also takes issue with the GTOCs' claim that they will suffer irreparable injury. AT&T claims it is possible for the GTOCs to identify and locate their customers should a

recoupment become necessary.[16] Furthermore, AT&T argues that grant of the stay would not further the public interest since the GTOCs have not demonstrated any infirmity in the Commission's refund Order. AT&T believes it is unfair to delay further the issuance of the refund since the GTOCs' interexchange customers have waited over 20 months to recover these overcharges.[17]

IV. DISCUSSION

8. We believe it is in the public interest to delay the effective date of the approximately $7 million in refunds the GTOCs are required to make while this matter is under review. Our decision to grant the GTOCs an extension of time, however, in no way affects any of the conclusions the Commission reached in the *Reconsideration Order*. In granting this extension we are merely relying upon the equitable discretion given the Commission under Section 705 of the APA and Section 4(j) of the Communications Act. In order to ensure that the GTOCs will be in a position to refund the overcharges if so required, we instruct the GTOCs to place $7.34 million, plus interest accrued as stipulated in paragraph 9, *infra*, in an interest bearing escrow account until October 16, 1990. The GTOCs must provide the Commission with written documentation by October 16, 1989, demonstrating that they have deposited these funds in such interest bearing escrow account. If the GTOCs fail to place these funds in escrow by that date, they must commence payment of the $7.34 million plus accrued interest by October 16, 1989. We note that this requirement is consistent with the approach suggested by the GTOCs in their pleading. *See* Paragraph 6, *supra*.

9. Accordingly, IT IS ORDERED pursuant to Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j), the GTE Telephone Operating Companies are granted an extension of time until October 16, 1990 to make refunds of $7.34 million in overcharges as required by the *Reconsideration Order*. Grant of this extension is contingent upon the GTE Telephone Operating Companies depositing $7.34 million, plus interest already accrued, in an interest bearing escrow account on or before October 16, 1989, and providing the Commission with written confirmation that such funds have been placed in said account. The simple interest accruing from April 27, 1989, to the date of deposit in escrow, using the current Internal Revenue Service rate, shall be added to the $7.34 million stated above. The same Internal Revenue Service rate shall then be used to compute simple interest from the date of deposit in escrow to the date refunds are finally paid. The cost of administering this account shall be borne by the GTE Telephone Operating Companies.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, FCC Rcd 4115 (1988) (*December 27 Order*), *recon.*, 4 FCC Rcd 3965 (1989) (*Reconsideration Order*).

[2] *See* NYNEX Telephone Companies Petition for Reconsideration, Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, filed May 30, 1989. *See also* Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company, Case No. 89-1081 and consolidated cases (D.C. Cir. Feb. 2, 1989).

[3] Annual 1988 Access Order, CC Docket No. 88-1, 3 FCC Rcd 1316 (Com.Car.Bur. 1988).

[4] *See* Letter dated Jan. 6, 1989, from Gail L. Polivy, Senior Attorney, GTE Service Corporation, to Secretary, FCC.

[5] *See* GTOCs Petition for Reconsideraion, CC Docket No. 88-1, Phase II, filed Jan. 27, 1989, at 4-13.

[6] *Id.* at 13-18.

[7] *Reconsideration Order*, 4 FCC Rcd at 3970-71.

[8] *Id.* at 3973.

[9] GTOCs Motion at 4. The GTOCs rely upon Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Jobbers*).

[10] *Id.* at 7 (citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)).

[11] *Id.* at 7-8.

[12] *Id.* at 9.

[13] *Id.*

[14] AT&T Opposition at 5-6.

[15] *Id.* at 6.

[16] *Id.* at 8.

[17] *Id.* at 8-9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LEBANON VALLEY CABLE
TV COMPANY,
Complainant,

v. File No. PA-87-0014

METROPOLITAN EDISON COMPANY,
Respondent.

ORDER

Adopted September 29, 1989; Released: October 20, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On August 11, 1987, Lebanon Valley Cable TV Company (Lebanon Valley) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that the respondent, Metropolitan Edison Company (Metropolitan Edison), had imposed unjust and unreasonable rates for cable television pole attachments.

2. On June 20, 1988, counsel for the complainant filed a letter requesting dismissal of the complaint. This request was opposed by the respondent who had filed a cross-complaint alleging that the rate it was charging was, in fact, below the allowable maximum. Subsequently, by letter dated August 15, 1989, counsel for the respondent informed the Commission that Lebanon Valley has been acquired by another company which has entered into a new contract with the respondent, rendering the instant complaint moot. Consequently, Metropolitan Edison indicates that it no longer opposes dismissal.

3. On the basis of the pleadings before us, we conclude that there no longer are issues in controversy in the instant case and that the requests for dismissal from the complainant and respondent should, thus, be granted.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Lebanon Valley Cable TV Company is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

B & D CABLE,
Complainant,

v. File No. PA-89-001

BALDWIN COUNTY ELECTRIC
MEMBERSHIP CORPORATION,
Respondent.

ORDER

Adopted September 29, 1989; Released: October 20, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On March 30, 1989, B & D Cable (B & D) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a ruling which would compel the respondent, Baldwin County Electric Membership Corporation (Baldwin County), to negotiate a pole attachment agreement with the complainant. B & D alleged that Baldwin County refused to enter into an agreement with B & D even though Baldwin County has entered into such agreements with one or more other cable television companies.

2. Counsel for the complainant has advised the Enforcement Division that the parties have engaged in discussions to address the concerns raised by B & D in its complaint. As a result of these discussions, B & D has filed a motion to dismiss its complaint without prejudice.

3. We encourage negotiations and mutually agreeable settlements in formal complaint cases. In the instant case, the complainant apparently is confident that its dispute with the respondent has been or can be resolved without Commission involvement. Such a private resolution among the parties will serve the public interest by eliminating the need for further litigation and the expenditure of the time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by B & D Cable is DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 20, 1989

US WEST COMPANIES FILE APPLICATION FOR AUTHORITY TO CONSOLIDATE

The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (MTN, NWB, and PNB, respectively) have filed an application under Section 221(a) of the Communications Act, 47 U.S.C. §221(a), and Sections 66.11-66.12 of the Commission's Rules, 47 C.F.R. §§66.11-66.12, for authority to consolidate into a single entity. Applicants propose to merge NWB and PNB into MTN, with MTN as the surviving corporation. Applicants are wholly-owned by U S West Communications Group, Inc. which is wholly-owned by U S West, Inc. The name of the company resulting from the merger would be changed from The Mountain States Telephone and Telegraph Company to U S West Communications, Inc. No new stock will be issued and there will be no change in the total capitalization of the applicants. Applicants have been operated on a consolidated basis since July of 1988 and the proposed corporate consolidation is expected to achieve further savings, greater efficiency of operation, a firmer basis for financing, and improved service to applicants' telephone customers.

The application has been found upon initial review, to be acceptable for filing. The Commission reserves the right to return the application if, upon further examination, it is determined to be defective and not in conformance with the Commission's Rules or policies.

Parties wishing to comment on this matter may do so no later than thirty (30) days after release of this notice. Reply comments should be filed no later than fifteen (15) days thereafter. All filings concerning this matter should refer to File No. ENF-90-01. A copy of the application and any subsequently filed documents in this matter may be obtained from International Transcription Services, Inc., 2100 "M" Street, N.W., Suite 140, Washington, D.C. 20036, (202) 857-3800. The application and documents are also available for inspection and copying in Room 6206, 2025 "M" Street, N.W., Washington, D.C. 20554. For further information contact Adrien Auger at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRAVEL IMPRESSIONS, LTD.,
Complainant,

v. File No. E-89-63

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant.

ORDER

Adopted: September 28, 1989; Released: October 20, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 21, 1988, Travel Impressions, Ltd. filed a formal complaint alleging improper billing by MCI Communications Corporation for unauthorized calls made by unknown third parties through complainant's telephone lines.

2. Complainant subsequently advised the Enforcement Division that settlement discussions with the defendant had been initiated. Travel Impressions first sought to withdraw its complaint without prejudice while these discussions were pending. Later, upon adoption of a settlement agreement resolving all pending controversies, Travel Impressions requested that the complaint be dismissed with prejudice.

3. We encourage negotiations and mutually agreeable settlements in formal complaint cases. In the instant case, we are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Dismiss filed by Travel Impressions, Inc. IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDWEST CELLULAR TELEPHONE COMPANY,
Complainant,

v. File No. E-88-113

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: September 26, 1989; Released: October 20, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 10, 1988, Midwest Cellular Telephone Company (Midwest) filed a formal complaint against Southwestern Bell Telephone Company (SWB) in which it alleged that SWB's charges in Missouri for NXX Code assignments violated Sections 201 and 202 of the Communications Act, 47 U.S.C. §§201 and 202, and the Commission's policies on NXX Code assignments to cellular carriers. SWB filed its answer on September 14, 1988 and Midwest filed its reply on September 28, 1988.

2. On September 25, 1989, Midwest filed a motion to dismiss the complaint without prejudice on the ground that the parties have reached a settlement. The parties have executed an interconnection agreement concerning four states which encompasses the issues raised in the instant complaint. The agreements will be presented to the applicable state regulatory commissions for approval. We believe, therefore, that it is in the public interest to grant Midwest's motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the motion of Midwest Cellular Telephone Company IS GRANTED.

4. IT IS FURTHER ORDERED that the above-referenced complaint IS DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v.

UNITED TELEPHONE COMPANY OF THE NORTHWEST,	File No. E-87-86
UNITED INTER-MOUNTAIN TELEPHONE COMPANY,	File No. E-87-87
UNITED TELEPHONE COMPANY OF MISSOURI,	File No. E-87-88
UNITED TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-87-89
UNITED TELEPHONE COMPANY OF THE WEST - NEBRASKA,	File No. E-87-90
UNITED TELEPHONE COMPANY OF NEW JERSEY,	File No. E-87-91
UNITED TELEPHONE COMPANY OF MINNESOTA,	File No. E-87-92
UNITED TELEPHONE COMPANY OF ARKANSAS,	File No. E-87-93
UNITED TELEPHONE COMPANY OF TEXAS, INC.,	File No. E-87-94
UNITED TELEPHONE COMPANY OF THE WEST - WYOMING,	File No. E-87-95
UNITED TELEPHONE COMPANY OF THE CAROLINAS,	File No. E-87-96
UNITED TELEPHONE COMPANY OF IOWA,	File No. E-87-97
UNITED TELEPHONE COMPANY OF FLORIDA,	File No. E-87-98
UNITED TELEPHONE COMPANY OF KANSAS, INC.,	File No. E-87-99
CAROLINA TELEPHONE AND TELEGRAPH COMPANY, Defendants.	File No. E-87-116

ORDER

Adopted: September 29, 1989; Released: October 20, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed formal complaints against, *inter alia*, the above-listed telephone operating companies of United Telecommunications, Inc. (United). The complaints alleged certain statutory and tariff violations associated with defendants' billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties to the above - captioned complaints have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On September 28, 1989, counsel for AT&T and United filed a joint motion seeking dismissal of the complaint with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaints IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-87-85

ROCHESTER TELEPHONE
CORPORATION,
Defendant.

ORDER

Adopted: September 29, 1989; Released: October 20, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed a formal complaint against Rochester Telephone Corporation (Rochester). The complaint alleged certain statutory and tariff violations associated with defendant's billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties to the above-captioned complaint have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On September 25, 1989, counsel for AT&T and Rochester filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-103

In the Matter of

Amendment of Parts 2, 25, 80, and 87 of the Commission's Rules regarding implementation of the Final Acts of the World Administrative Radio Conference for the Mobile Services, Geneva, 1987.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1989; Released: October 19, 1989

By the Commission:

I. INTRODUCTION

1. On April 26, 1989, we initiated the first in a series of proceedings to implement the Final Acts of the 1987 World Administrative Radio Conference for Mobile Services (1987 Mobile WARC) into the Commission's Rules. The 1987 Mobile WARC revised many portions of the International Radio Regulations pertaining to the mobile telecommunications services. This *Report and Order* amends the Table of Frequency Allocations, the feeder links allocation for the Radiodetermination Satellite Service (RDSS), and certain maritime and aeronautical mobile service rules.

2. This proceeding adopts the first set of changes due to become effective as a result of the 1987 Mobile WARC, *i.e.*, those revisions to the Radio Regulations that become effective on October 3, 1989.[1] It also includes some remaining changes from earlier conferences, particularly the 1983 World Administrative Radio Conference for Mobile Services (1983 Mobile WARC) that have not been implemented in the Commission's Rules to date.

II. BACKGROUND

3. The 1987 Mobile WARC, held in Geneva from September 14 to October 17, 1987, covered a wide range of mobile telecommunications matters. The purpose of the 1987 Mobile WARC was to review and revise the Radio Regulations concerning the mobile services, the mobile satellite services (MSS), and the radiodetermination satellite services (RDSS). It also made substantial modifications to the high frequency (HF) maritime mobile band (4000-27500 kHz) and revisions to implement the Global Maritime Distress and Safety System (GMDSS).

4. Generally, the revisions of the Radio Regulations were in accord with U.S. proposals and most of our objectives were attained either in whole or in part. The notable exceptions were in the areas of mobile satellite allocations and radio operator requirements.[2] In these areas, the U.S. had serious concerns about the actions taken, and the delegation made protocol statements that said the U.S. would not accept certain decisions of the conference. By taking these reservations, the U.S. formally advised the international community that it disagreed with these revisions and that our domestic provisions may differ from the international requirements.

5. The Final Acts of the 1987 Mobile WARC provided that the revisions enter into force in two stages. Most of the frequency allocation changes, including RDSS and MSS, as well as various technical requirements concerning the maritime and aviation services enter into force on October 3, 1989. The remaining changes, which pertain to the HF bands and the implementation of the GMDSS, become effective on July 1, 1991.[3]

6. On April 26, 1989, we adopted a *Notice of Proposed Rule Making* (*Notice*) addressing those revisions that become effective in October, 1989.[4] Because most of the changes were in accordance with U.S. proposals to the 1987 Mobile WARC, little controversy was expected. Ten parties filed comments, one filed reply comments, and one filed a letter of clarification.[5] After review of the comments, we find that the record supports adoption of the amendments contained herein.[6]

III. ISSUES ANALYSIS

7. In general, all ten commenting parties offered general support for the outcome of the 1987 Mobile WARC and the proposed changes to the Commission's Rules.[7] ARINC takes exception, however, to our interpretation of the U.S. protocol statement regarding the L-band allocation (1530-1559 MHz and 1626.5-1660.5 MHz).[8]

8. Although the comments were favorable, the parties raised several issues. In some cases, further clarification is requested. The issues are summarized here and a full discussion of each follows.

(a) What changes should be made to the Table of Frequency Allocations, particularly at L-band?

(b) Which bands should be specified for RDSS feeder links?

(c) How is existing maritime equipment affected by the stricter 10 Hz frequency tolerance requirement?

(d) What changes should be adopted concerning VHF distress frequency 156.8 MHz (channel 16)?

9. *Table of Frequency Allocations.* In the *Notice*, we proposed to amend the Table of Frequency Allocations (47 C.F.R. § 2.106).[9] Except for the spectrum allocated for the MSS, the proposed amendments reflect the frequency allocation changes adopted internationally. At L-band, we proposed to reflect only the international changes in the columns 1-3 and to make no changes to the domestic MSS allocation in columns 4-7.[10] We indicated that because the MSS allocations were not adopted internationally as the U.S. had proposed, the U.S. took a formal reservation on the allocations in the bands 1530-1559 MHz and 1626.5-1660.5 MHz (L-band). Thus, we stated that the Commission has the flexibility to maintain the current domestic allocation. The domestic L-band matter was deferred to the original Mobile Satellite proceeding that was under further reconsideration by the Commission.[11]

10. Concerning the L-band matter, ARINC and AMSC filed comments and AMSC filed reply comments. AMSC, an MSS licensee, supports leaving intact the domestic MSS allocation.[12] ARINC agrees with deferring the domestic MSS issue to the original Mobile Satellite proceeding (*i.e.*, GEN Docket No. 84-1234), but takes exception to our interpretation of the U.S. protocol statement regarding the L-band allocation.[13] ARINC contends that the U.S. statement if read literally, is not a reservation but merely declares a unilateral intention to utilize the relevant bands for other, additional purposes. It argues that use of the L-band by land mobile systems (*i.e.*, MSS) would cause significant interference to an international safety service. In reply comments, AMSC rejects ARINC's arguments and notes that the reservation was "the proper, diplomatic means by which the U.S. notified other countries of its intentions."[14] ARINC also indicated that Footnote 729A should be adopted; thereby making it explicit that airline passenger communications (APC) are permitted in the L-band.[15] AMSC, however, opposes specific recognition of APC, which are already permitted under MSS.[16]

11. ARINC and AMSC comments were essentially a reiteration of the arguments raised in further reconsideration of GEN Docket No. 84-1234. The Commission's decision on May 31, 1989, fully considered both the implications of the U.S. reservation and the provisions of APC within the L-band spectrum. The Commission reaffirmed the U.S. protocol statement against the L-band allocation and no changes to the domestic allocation for L-band were adopted.[17]

12. With regard to the rest of the proposed amendments to the Table of Frequency Allocations, few comments were received. Tideland supports the footnote changes in the 3/9 GHz bands as providing for the future use of marine radar beacons.[18] AAR recognizes the importance of maintaining the current provisions of Radio Regulations, footnote 613 and Appendix 18, which allows administrations discretion concerning the use of the 156-162 MHz band.[19] GPC also indicates support for the Commission's proposal not to implement terrestrial APC.[20] ARINC notes an error in reproducing international footnote 726A.

13. Upon review of the record, the Table of Frequency Allocations (47 C.F.R. § 2.106) is amended as proposed. As discussed in the *Notice*, the changes reflect the international frequency allocations, with the exception of the MSS located at L-band.[21] A few of the notable changes are summarized here. At 70-90 kHz and 110-130 kHz, pulsed radionavigation systems are allocated on a secondary basis in Regions 2 and 3. The aeronautical radionavigation service (*i.e.*, radiobeacons) is accorded primary status at 415-435 kHz in the U.S., Cuba, and Mexico. Several changes are adopted for the radiodetermination service in the 2900-3300 MHz, 5470-5650 MHz, and 9200-9500 MHz bands. These revisions reflect the U.S. proposals to the 1987 Mobile WARC and have been fully coordinated with the other government agencies. Several editorial corrections are made to the proposed footnotes to bring them into conformance with the international footnotes.

14. *RDSS feeder links.* In the *Notice*, we indicated that the RDSS was allocated spectrum in accordance with the U.S. proposals, except for a change in the feeder links band. Therefore, we proposed to reflect this change to the domestic RDSS feeder link allocation.[22] The proposal was expected to have minimal impact because there is only one licensee at present and its system is not due to become operational before 1992. No other domestic changes for RDSS were proposed as a result of the 1987 Mobile WARC.

15. The current RDSS licensee, GPC, indicates support for the proposal and notes that it has been diligent not only in developing RDSS within the U.S. but also in extending this technology to the rest of world.[23] In addition to supporting the RDSS feeder link change, however, it proposes that 47 C.F.R. § 25.202(a)(2) be amended to increase the uplink feeder link band from 6525-6541.5 MHz to 6525-6607 MHz. GPC recently requested, in an application filed December 13, 1988, that its authorization for an RDSS satellite system be modified to increase the feeder link bandwidth at 6 GHz from 6525-6541.5 MHz to 6525-6606.625 MHz.[24] AMSC, in reply comments, opposes expansion of the feeder link band.[25] GPC in its clarification letter emphasizes that it wishes an amendment of Part 25 only. It states that the 6525-6606.625 MHz band is already allocated to the fixed satellite service and, therefore, by definition is available for RDSS feeder links.[26]

16. We find that the request to modify the RDSS service rules to expand the uplink feeder band to 6525-6607 MHz is outside the scope of this proceeding. This request does not stem from any action taken at the 1987 Mobile WARC. Moreover, because it is not an allocation matter, as GPC points out, this issue would be better examined during the processing of GPC's application currently on file. Further, considering that no opposition was filed to the proposed feeder downlink change at 5 GHz, we adopt the change from 5117-5183 MHz to 5150-5216 MHz. This change is in keeping with the international allocation and will ensure protection globally and enhance opportunities for RDSS to expand worldwide. No other domestic changes to the RDSS are needed as a result of the 1987 Mobile WARC.

17. *Revised 10 Hz frequency tolerance for maritime transmitters.* In the *Notice*, we proposed a 10 Hz frequency tolerance for ship and coast stations using narrow-band direct-printing (NBDP) and for ship stations using digital selective calling (DSC) techniques for transmitters installed after January 1, 1992.[27] We noted that these changes are necessary to improve the operational reliability of automated digital communications equipment. These improvements are required in anticipation of implementing the GMDSS, which will be phased in worldwide from 1992 to 1999.[28]

18. This proposal generated the most interest by the commenting parties. Five parties request clarification of the implementation date with regard to existing equipment. Rockwell, RTCM, USCG, MMR, and AIMS question whether existing NBDP and DSC equipment would be required to meet the new 10 Hz frequency tolerance after January 1, 1992, or whether it would be grandfathered. They suggest revisions to allow grandfathering of existing equipment until full implementation of GMDSS (*i.e.*, February 2, 1999), in accordance with the Final Acts of the 1987 Mobile WARC. Rockwell urges the Commission to adhere to the schedule set forth in Appendix 7 of the Final Acts.[29] Rockwell argues that the grandfathering agreements reached at the 1987 Mobile WARC would avoid artificial barriers and disincentives for implementing DSC and expanding NBDP. It states that these are essential considerations and that the international schedule offers an appropriate balance in encour-

aging implementation while improving the technical quality of future equipment.[30] RTCM, a non-profit organization concerned with maritime telecommunications matters, also questions the 10 Hz tolerance with regard to grandfathering NBDP and DSC equipment.[31] It recommends continuance of the 40 Hz tolerance (*i.e.*, the current international requirement) for NBDP transmitters in use or installed before January 2, 1992. It argues that requiring replacement of NBDP equipment by January 1, 1992, would impose an undue economic burden on ship operators without increasing the effectiveness of communications. For transmitters employing DSC techniques, RTCM recommends implementation of the 10 Hz tolerance as prescribed by the 1987 Mobile WARC, *i.e.*, after full implementation of the GMDSS. It states that most existing ship transmitters in 100-27500 kHz bands have a 20 Hz frequency tolerance and are used on a multipurpose basis. Because the new equipment would not be compatible with existing equipment, RTCM argues that an accelerated move to the 10 Hz frequency tolerance would deter implementation of DSC within the maritime community. USCG suggests language to clarify that existing transmitters used for NBDP may continue to be used, in keeping with Appendix 7 of the Final Acts.[32] MMR, licensee of public coast station WLO in Mobile, Alabama, indicates that the proposal lacks clarity and urges the Commission to refrain from imposing equipment standards on mobile equipment which are more stringent that those found in the Radio Regulations.[33] AIMS, a national trade association, suggests that 47 C.F.R. § 80.209, notes 3 and 5, be revised to allow grandfathering of existing NBDP and DSC equipment until full implementation of the GMDSS.

19. To clarify, there are actually four requirements under consideration here: frequency tolerances for NBDP coast stations, DSC coast stations, NBDP ship stations, and DSC ship stations. The frequency tolerance requirements of the Final Acts of the 1987 Mobile WARC, Appendix 7, are as follows:

> (1) for coast stations using NBDP, 15 Hz for transmitters in use or installed before January 2, 1992, and 10 Hz for transmitters installed after January 1, 1992.
>
> (2) for coast stations using DSC, 10 Hz for transmitters installed after January 1, 1992, and for all transmitters, regardless of its installation date, after the date of full implementation of the GMDSS (*i.e.*, February 2, 1999).
>
> (3) for ship stations using NBDP, 40 Hz for transmitters in use or installed before January 2, 1992, and 10 Hz for transmitters installed after January 1, 1992.
>
> (4) for ship stations using DSC, 10 Hz for transmitters installed after January 1, 1992, and for all transmitters, regardless of its installation date, after the date of full implementation of the GMDSS (*i.e.*, February 2, 1999).

Internationally, all equipment installed after January 1, 1992, NBDP or DSC, coast or ship stations, must meet the new 10 Hz tolerance. The treatment of existing transmitters used for NBDP and DSC, however, differs. Internationally, existing transmitters used for NBDP, whether coast or ship, may continue to be used after January 1, 1992, without limit. Existing transmitters used for DSC, whether coast or ship, may continue to be used after January 1, 1992, but on February 2, 1999 (*i.e.*, full implementation of the GMDSS), all DSC transmitters in use must meet the new 10 Hz requirement.

20. The current transmitter frequency tolerances are specified in 47 C.F.R. § 80.209(a) of the Commission's Rules. Both the current and the proposed requirements for each of the four categories are examined in detail below.

Current	Proposed
(1) for coast stations using NBDP, 15 Hz for all transmitters	15 Hz until January 1, 1992, and 10 Hz for transmitters installed on or after January 1, 1992.
(2) for coast stations using DSC, 15 Hz until January 1, 1990, and 10 Hz thereafter.	(no change)
(3) for ship stations using NBDP, 20 Hz for all transmitters	20 Hz until January 1, 1992, and 10 Hz for transmitters installed on or after January 1, 1992.
(4) for ship stations using DSC, 20 Hz until January 1, 1995, and and 10 Hz thereafter.	20 Hz until January 1, 1992, and 10 Hz thereafter.

21. For both coast and ship stations using NBDP, our intention was to grandfather transmitters installed prior to January 1, 1992. Thus, we have rewritten proposed 47 C.F.R. § 80.209, note 5, to clarify that existing transmitters installed before January 2, 1992, may continue to be used indefinitely at the same station. This is in accordance with the international requirement. With regard to coast stations using DSC, the current Rules require the new 10 Hz tolerance for all equipment as of January 1, 1990, 47 C.F.R. § 80.209, note 2. This is two years earlier than the revised international date of January 1, 1992, for new equipment and nine years earlier than full implementation of the GMDSS for all DSC transmitters. We proposed no change to this requirement. Upon re-examination of this matter we find little justification to change this date. Although we are sensitive to the arguments that stations may more easily add DSC equipment to their existing systems if a tolerance of 20 Hz is permitted, we find that keeping the present requirement of 10 Hz starting on January 1, 1990, for coast stations is reasonable and in the public interest. First, considering that January 1, 1990, is fast approaching, any coast station planning to add DSC equipment in the early 1990's would have already considered its equipment needs based on existing Commission Rules. Second, reliable communications can be enhanced by initially requiring this improvement on a small number of coast stations rather than the more numerous ship stations.[34] Third, the cost of replacing equipment purchased in 1990 under old specifications is avoided. For ship stations using DSC, 47 C.F.R. § 80.209 note 3, currently requires a 10 Hz tolerance for all transmitters after January 1, 1995. We proposed to change that date to January 1, 1992. The international requirement is a 10 Hz tolerance for DSC transmitters installed after January 1, 1992, and for *all* transmitters, regardless of their installation date, after February 2, 1999, (*i.e.*, full implementation of the GMDSS). Considering the comments before us and wishing to encourage the use of DSC, we adopt the

international requirement and have rewritten note 3 accordingly. Consequently, existing ship transmitters used for DSC do not need to meet the new 10 Hz tolerance until 1999.[35] We caution all ship operators, however, that on February 2, 1999, *all* ship station transmitters used for DSC will have to meet the 10 Hz tolerance, in accordance with international requirements.

22. In summary, we have rewritten the proposed rules for coast and ship stations to clarify that existing transmitters used for NBDP installed before January 2, 1992, may continue to be used at the same station. This is in accordance with the international requirements for NBDP equipment. The rule regarding ship stations using DSC has also been rewritten in accordance with the international requirements. It permits ship station transmitters used for DSC installed prior to January 2, 1992, to continue to be used until February 2, 1999 (*i.e.*, full implementation of the GMDSS) when the new 10 Hz tolerance becomes effective for all DSC ship station transmitters. For coast stations using DSC, however, we have maintained the date of January 1, 1990, in accordance with the Commission's current rules. Finally, we clarify that adding a separate NBDP or DSC facility to existing transmitters in use under existing tolerances is not considered a newly installed transmitter. Consequently, such an arrangement may be used indefinitely for NBDP and until February 2, 1999, for DSC. We believe these changes reflect the international requirements for transmitters used for NBDP and DSC and are responsive to the comments filed.

23. *VHF distress frequency 156.8 MHz (channel 16).* In the *Notice*, we proposed to modify 47 C.F.R. §§ 80.379 and 87.187 to clarify that aircraft may use frequency 156.8 MHz (channel 16) at any altitude for VHF distress and safety.[36] In rewriting these rules, however, we noted that aircraft could continue to use 156.8 MHz for general calling purposes below 1,000 feet, in accordance with current Commission provisions. RTCM and USCG oppose the proposed clarification and suggest that we restrict the use of 156.8 MHz by aircraft to safety purposes only. RTCM expresses concern over the proposed rewording due to the current congestion on 156.8 MHz. It recommends that aircraft use of 156.8 MHz be restricted to safety only as prescribed by the Radio Regulations and notes that no change in this provision was made at the 1987 Mobile WARC.[37] The USCG further states that the proposed change encourages an increased use of 156.8 MHz and an expanded access to maritime channels by aircraft.[38] It notes that congestion on 156.8 MHz is a growing problem that is adversely affecting current safety communications and that there is no easy solution in the immediate future.[39] USCG recommends that the following language be added to the current Rules, 47 C.F.R. §§ 80.379 and 87.187:

> Calling on 156.8 MHz by aircraft is limited to safety purposes only.[40]

It further suggests that the use of 156.3 MHz be expanded from safety purposes only to include search and rescue operations.[41]

24. These restrictions proposed by RTCM and USCG are clearly beyond the scope of this proceeding. Our proposal was simply to clarify that the use of 156.8 MHz is permitted at any height for distress and safety purposes. In 1978, the Commission permitted 156.8 MHz (channel 16) to be used for calling by aircraft below 1,000 feet.[42] No specific cases of interference have been brought to our attention to indicate that the current usage of 156.8 MHz by aircraft is causing any significant degradation of maritime safety communications. Therefore, we will make no changes to 47 C.F.R. §§ 80.379 and 87.187 at this time. If it is shown, however, that serious problems exist with continuing aircraft access to 156.8 MHz, we will address this matter in a future proceeding. Finally, we stress that we do not encourage additional use of 156.8 MHz (channel 16) for general calling purposes by aircraft.

25. *Miscellaneous amendments.* Various other changes were proposed in the Notice.[43] Except for Rockwell noting an error in the class of emissions specified in 47 C.F.R. § 80.359, no comments on these other proposals were received. Therefore, the proposed changes are adopted. In particular, we adopt a new emission limit of 28 dB relative to the mean power for single-sideband radiotelephone transmitters operating in the bands 1605-27500 kHz. We specify additional frequencies below 4 MHz for DSC and radiotelephony calling.[44] We replace detailed technical requirements for NBDP operations by references to the appropriate International Radio Consultative Committee (CCIR) Recommendations.[45] These changes reflect the revisions to the Radio Regulations adopted at the 1987 Mobile WARC or earlier conferences. They will ensure that future equipment meets or exceeds the international standards.

26. We also adopt new definitions for aeronautical mobile route (R) and off-route (OR) services, aeronautical mobile satellite (R) and (OR) services, land earth station, base earth station, and land mobile earth station. The definition of RDSS is amended as proposed. These changes reflect definitions adopted by the 1987 Mobile WARC. We adopt the proposed editorial changes to 47 C.F.R. § 87.187(o) and (x) also. Finally, the emissions designators in 47 C.F.R. § 80.359 are moved to 47 C.F.R. § 80.207, as suggested by Rockwell.

IV. CONCLUSION

27. Adoption of the amendments to the Commission's Rules would bring the U.S. into conformance with the international provisions without delay. By taking this action now all parties will be given the longest possible time to effect the necessary changes.[46] We note, however, that the U.S. Senate has not provided its advice and consent to ratification of the Final Acts of the 1987 Mobile WARC. Should any provision of the Final Acts not be ratified as written, further amendments of the Rules may be required.

28. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease the burden hours imposed on the public.

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Parts 2, 25, 80, and 87 of the Commission's Rules ARE AMENDED as set forth in the Appendix below.

30. IT IS FURTHER ORDERED that this *Report and Order* will be effective 30 days after publication in the Federal Register.

31. IT IS FURTHER ORDERED that a copy of this *Report and Order* be sent to the Chief Counsel for Advocacy of the Small Business Administration.

32. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 2, 25, 80 and 87 of Title 47 of the Code of Federal Regulations are amended as follows:

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48 stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

2. Section 2.1 is amended by revising the definition for *Radiodetermination-Satellite Service* and adding the others in the correct alphabetical position:

§ 2.1 Terms and definitions.

Aeronautical Mobile Off-Route (OR) Service. An aeronautical mobile service intended for communications, including those relating to flight coordination, primarily outside national or international civil air routes.(RR)

Aeronautical Mobile Route (R) Service. An aeronautical mobile service reserved for communications relating to safety and regularity of flight, primarily along national or international civil air routes.(RR)

Aeronautical Mobile-Satellite Off-Route (OR) Service. An aeronautical mobile-satellite service intended for communications, including those relating to flight coordination, primarily outside national and international civil air routes.(RR)

Aeronautical Mobile-Satellite Route (R) Service. An aeronautical mobile-satellite service reserved for communications relating to safety and regularity of flights, primarily along national or international civil air routes.(RR)

Base Earth Station. An earth station in the fixed-satellite service or, in some cases, in the land mobile-satellite service, located at a specified fixed point or within a specified area on land to provide a feeder link for the land mobile-satellite service.(RR)

Land Earth Station. An earth station in the fixed-satellite service or, in some cases, in the mobile-satellite service, located at a specified fixed point or within a specified area on land to provide a feeder link for the mobile-satellite service.(RR)

Land Mobile Earth Station. A mobile earth station in the land mobile-satellite service capable of surface movement within the geographical limits of a country or continent.(RR)

Radiodetermination-Satellite Service. A radiocommunication service for the purpose of radiodetermination involving the use of one of more space stations. This service may also include feeder links necessary for its own operation.(RR)

3. In Section 2.104, paragraph (c)(3) is revised to read as follows:

§ 2.104 International Table of Frequency Allocations.

* * * * *

(c) * * *

(3) The "European Maritime Area" is bounded to the north by a line extending along parallel 72^0 North from its intersection with meridian 55^0 East of Greenwich to its intersection with meridian 5^0 West, then along meridian 5^0 West to its intersection with parallel 67^0 North, thence along parallel 67^0 North to its intersection with meridian 32^0 West; to the west by a line extending along meridian 32^0 West to its intersection with parallel 30^0 North; to the south by a line extending along parallel 30^0 North to its intersection with meridian 43^0 East; to the east by a line extending along meridian 43^0 East to its intersection with parallel 60^0 North, thence along parallel 60^0 North to its intersection with meridian 55^0 East and thence along meridian 55^0 East to its intersection with parallel 72^0 North.

* * * * *

4. Section 2.106 is amended by removing Footnotes 458, 473, 583, 590, 680, 681, 698, 699, 728, 774, 775, 776, US39, US232, US241, US248, US249, US280, US288, and US293 in their entirety, and by revising the Table of Frequency Allocations and the subsequent Footnotes in the appropriate positions to read as follows:

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*		*	*		*
14-19.95			14 - 19.95	14 - 19.95		
	* * *		FIXED MARITIME MOBILE	Fixed	* * *	
			448 US294	448 US294		
*	*		*	*		*
20.05 - 70			20.05 - 59	20.05 - 59		
	* * *		FIXED MARITIME MOBILE	FIXED	* * *	
			448 US294	448 US294		
			59 - 61	59 - 61		
			* * *	* * *		* * *
			61 - 70	61 - 70		
			FIXED MARITIME MOBILE	FIXED	* * *	
			448 US294	448 US294		

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
70 - 72	70 - 90	70 - 72	70 - 90	70 - 90		
* * *	* * *	* * *	FIXED MARITIME MOBILE Radiolocation	FIXED Radiolocation	* * *	
72 - 84		72 - 84				
* * *		* * *				
84 - 86		84 - 86				
* * *		* * *				
86 - 90		86 - 90				
* * *		* * *	448 451 US294	448 451 US294		

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
90 - 110 RADIONAVIGATION 453 Fixed 453A 454			90 - 110 * * *	90 - 110 * * *	* * *	
110 - 112 * * *	110 - 130 * * *	110 - 112 * * *	110 - 130 FIXED MARITIME MOBILE Radiolocation	110 - 130 FIXED MARITIME MOBILE Radiolocation	* * *	
112 - 115 * * *		112 - 117.6 * * *				
115 - 117.6 * * *						
117.6 - 126 * * *		117.6 - 126 * * *				
126 - 129 * * *		126 - 129 * * *				
129 - 130 * * *		129 - 130 * * *	451 454 US294	451 454 US294		

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
130 - 148.5	130 - 160	130 - 160	130 -160	130 - 160		
MARITIME MOBILE /FIXED/	* * *	* * *	* * *	* * *	* * *	
454 457						
148.5 - 255						
BROADCASTING						
	160 - 190	160 -190	160 - 190	160 -190		
	* * *	* * *	* * *	* * *	* * *	
	190 - 200		190 - 200	190 - 200		
	* * *		* * *	* * *		
	200 - 275	200 - 285	200 - 275	200 - 275		
	AERONAUTICAL RADIONAVIGATION Aeronautical Mobile	AERONAUTICAL RADIONAVIGATION Aeronautical Mobile	* * *	* * *	* * *	
460 461 462						
255 - 283.5						
BROADCASTING AERONAUTICAL RADIONAVIGATION/ 463						

§ 2.106 Table of Frequency Allocations

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	275 - 285		275 - 285	275 - 285		
	AERONAUTICAL RADIONAVIGATION Aeronautical Mobile Maritime Radionavigation (radiobeacons)		* * *	* * *		
462 464 464A						
283.5 - 315						
MARITIME RADIONAVIGATION (radiobeacons) 466 /AERONAUTICAL RADIONAVIGATION/ 464A 465 466A	285 - 315 * * *		285 - 325 * * *	285 - 325 * * *	* * *	
315 - 325	315 - 325	315 - 325				
* * *	* * *	* * *				

* * * * *

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
415 - 435	415 - 495		415 - 435	415 - 435		
* * *	MARITIME MOBILE 470 Aeronautical Radionavigation 470A		AERONAUTICAL RADIONAVIGATION MARITIME MOBILE 470 469A US294	AERONAUTICAL RADIONAVIGATION MARITIME MOBILE 470 469A US294	* * *	
435 - 495			435 - 495	435 - 495		
MARITIME MOBILE 470 Aeronautical Radionavigation 465 471 472A	469 469A 471 472A		MARITIME MOBILE 470 Aeronautical Radionavigation 471 472A US231 US294	MARITIME MOBILE 470 471 472A US231 US294	* * *	

* * * * *

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
505 - 526.5	505 - 510	505 - 526.5	505 - 510	505 - 510		
MARITIME MOBILE 470 /AERONAUTICAL RADIONAVIGATION/	* * *	MARITIME MOBILE 470 474 /AERONAUTICAL RADIONAVIGATION/	* * *	* * *	* * *	
465 471 474 475 476	510 - 525 MOBILE 474 AERONAUTICAL RADIONAVIGATION	Aeronautical Mobile Land Mobile 471	510 - 525 AERONAUTICAL RADIONAVIGATION (radiobeacons) MARITIME MOBILE (Ships only) 474 US14 US18 US225	510 - 525 AERONAUTICAL RADIONAVIGATION (radiobeacons) MARITIME MOBILE (Ships only) 474 US14 US18 US225	* * *	518 kHz is used for international NAVTEX in the Maritime Mobile Service
	525 - 535		525 - 535	525 - 535		
	* * *		* * *	* * *	* * *	* * *
526.5 - 1 606.5		526.5 - 535				
* * *		* * *				

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	535 - 1 605	535 - 1606.5	535 - 1 605	535 - 1 605		
	* * *	* * *		* * *	* * *	
	1 605 - 1 625		1 605 - 1 615	1 605 - 1 615		
	BROADCASTING 480		* * *	* * *	* * *	* * *
1 606.5-1625		1 606.5 - 1 800				
MARITIME MOBILE 480A		* * *				
/FIXED/			1 615 - 1 625	1 615 - 1 625		
/LAND MOBILE/			* * *	* * *	* * *	
483 484	480A 481					
1 625 - 1 635	1 625 - 1 705		1 625 - 1 705	1 625 - 1 705		
* * *	BROADCASTING 480		* * *	* * *	* * *	
	/FIXED/					
	/MOBILE/					
	Radiolocation					
1 635 - 1 800	480A 481					
MARITIME	1 705 - 1 800		1 705 - 1 800	1 705 - 1 800		
MOBILE 480A						
/FIXED/	* * *		* * *	* * *	* * *	
/LAND MOBILE/						
483 484 488						

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 800 - 1 810	1 800 - 1 850	1 800 - 2 000	1 800 - 1 900	1 800 - 1 900		
* * *	AMATEUR	* * *		* * *	* * *	
1 810 - 1 850						
* * *						
1 850 - 2000	1 850 - 2 000					
* * *	AMATEUR					
	FIXED					
	MOBILE except aeronautical mobile		1 900 - 2 000	1 900 - 2 000		
	RADIOLOCATION		* * *	* * *	* * *	
	RADIONAVIGATION					
	494					
*	*		*	*	*	
2 173.5 - 2 190.5			2 173.5-2 190.5	2 173.5-2 190.5		
	MOBILE (distress and calling)		MOBILE (distress and calling)	MOBILE (distress and calling)	* * *	* * *
	500 501 500A 500B		500 501 US279 500A 500B	500 501 US279 500A 500B		
*	*		*	*	*	

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
74.8 - 75.2	AERONAUTICAL RADIONAVIGATION 572 572A		74.8 - 75.2 * * *	74.8 - 75.2 * * *	* * *	* * *
75.2 - 87.5 * * *	75.2 - 75.4 * * *		75.2 - 75.4 * * *	75.2 - 75.4 * * *		
	75.4 - 76 * * *	75.4 - 87 * * *	75.4 - 76	75.4 - 76 * * *	* * *	
	76 - 88 * * *		76 - 88 * * *	76 - 88 * * *	* * *	
		87 - 100 * * *				
87.5 - 100 * * *						

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	88 - 100		88 - 108	88 - 108		
	* * *		* * *	* * *	* * *	
100 - 108						
BROADCASTING						
582 584 585 586 587 588 589						
108 - 117.975			108 - 117.975	108 - 117.975		
AERONAUTICAL RADIONAVIGATION			* * *	* * *		
590A						
*	*		*	*		*
136 - 137			136 - 137	136 - 137		
AERONAUTICAL MOBILE (R)						
Fixed			* * *	* * *	* * *	
Mobile except aeronautical mobile(R)						
591 595 594A						
*	*		*	*		*

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
149.9-150.05			149.9-150.05	149.9-150.05		
RADIONAVIGATION-SATELLITE			RADIONAVIGATION-SATELLITE	RADIONAVIGATION-SATELLITE		
	609 609A		609A	609A		
150.05 - 153	150.05 - 156.7625		150.05 - 150.8	150.05 - 150.8		
* * *	FIXED MOBILE		* * *	* * *		
			150.8 - 156.2475	150.8 - 152		
				* * *	* * *	
				152 - 152.255		
	611 613 613A		* * *	* * *	* * *	
				152.255 - 152.495		
				* * *	* * *	
				152.495-152.855		
				* * *	* * *	

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
			GOVERNMENT	NON-GOVERNMENT		
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Allocation MHz	Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
				152.855-156.2475		
				* * *	* * *	
153 - 154						
* * *						
154 - 156.7625						
FIXED MOBILE except aeronautical mobile (R)						
613 613A						
			156.2475-157.0375	156.2475-157.0375		
				MARITIME MOBILE NG117		

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
156.7625 - 156.8375						
* * *						
156.8375 - 174	156.8375 - 174					
FIXED	* * *					
MOBILE except aeronautical mobile			613 613A US77 US106 US107 US266	613 613A US77 US106 US107 US266		
			157.0375-157.1875	157.0375-157.1875		
613 613B 614 615			* * *	* * *	* * *	
*	*		*	*	*	
174 - 223	174 - 216	174 - 223	174 - 216	174 - 216		
* * *	* * *	* * *	* * *	* * *	* * *	
	216 - 220 FIXED MARITIME MOBILE Radiolocation 627		216 - 220	216 - 220		
			* * *	* * *	* * *	
	627A					
*	*		*	*	*	

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
328.6 - 335.4			328.6 - 335.4	328.8 - 335.4		
AERONAUTICAL RADIONAVIGATION			* * *	* * *		
645 645A						
*	*		*	*	*	
399.9 - 400.05			399.9 - 400.05	399.9 - 400.05		
RADIONAVIGATION-SATELLITE			RADIONAVIGATION SATELLITE 645B	RADIONAVIGATION SATELLITE 645B		
609 645B						
*	*		*	*	*	
406 - 406.1			406 - 406.1	406 - 406.1		
MOBILE-SATELLITE (Earth-to-space)			MOBILE-SATELLITE (Earth-to-space)	MOBILE-SATELLITE (Earth-to-space)		
649 649A			649 649A	649 649A		
*	*		*	*	*	

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
420 - 430			420 - 450	420 - 450		
* * *			* * *	* * *	* * *	
430 - 440	430 - 440					
* * *	RADIOLOCATION Amateur					
	653 658 659 660 660A 663 664					
440 - 450						
* * *						
*	*		*	*	*	
470 - 790	470 - 512	470 - 585	470 - 512	470 - 512		
BROADCASTING	* * *	* * *		* * *	* * *	
	512 - 608		512 - 608	512 - 608		
	* * *	585 - 610		* * *	* * *	
		* * *				

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	608 - 614		608 - 614	608 - 614		
676 667A 682 683 684 685 686 686A 687 689 693 694	* * *	610 - 890 * * *	* * *	* * *		
	614 - 806		614 - 806	614 - 806		
790 - 862 FIXED BROADCASTING	BROADCASTING Fixed Mobile 675 692 692A 693			* * *	* * *	
	806 - 890		806 - 902	806 - 821		
694 695 695A 696 697 702	FIXED MOBILE BROADCASTING		* * *	* * *	* * *	
862 - 890 FIXED MOBILE except aeronautical mobile BROADCASTING 703 704	692A 700			821 - 824 * * *	* * *	

* * * * *

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
890 - 942	890 - 902	890 - 942		894 - 896		
* * *	FIXED	* * *		* * *	* * *	
	MOBILE except aeronautical mobile			896 - 901		
	Radiolocation			* * *	* * *	
				901 - 902		
	704A 705			* * *	* * *	
	902 - 928		902 - 928	902 - 928		
	FIXED		* * *	* * *	* * *	* * *
	Amateur					
	Mobile except aeronautical mobile					
	Radiolocation					
	705 707 707A					
	928 - 942		928 - 932	928 - 929		
	* * *		* * *	* * *	* * *	
				929 - 932		
				* * *	* * *	

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
			GOVERNMENT	NON-GOVERNMENT		
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Allocation MHz	Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
			932 - 935	932 - 935		
			* * *	* * *	* * *	
			935 - 941	935 - 940		
			* * *	* * *	* * *	
				940 - 941		
				* * *	* * *	
			941 - 944	941 - 944		
			* * *	* * *		
942 - 960	942 - 960	942 - 960	944 - 960	944 - 960		
FIXED	* * *	* * *		* * *	* * *	
MOBILE except aeronautical mobile						
BROADCASTING 703						
704						
*	*		*	*	*	

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 215 - 1 240			1 215 - 1 240	1 215 - 1 240		
	RADIOLOCATION RADIONAVIGATION-SATELLITE (space-to-earth) 710 711 712 712A 713		* * *	* * *		
1 240 - 1 260			1 240 - 1 300	1 240 - 1 300		
	RADIOLOCATION RADIONAVIGATION-SATELLITE (space-to-earth) 710 711 712 712A 713 714		* * *	* * *	* * *	
1 260 - 1 300						
	RADIOLOCATION Amateur 664 711 712 712A 713 714					
*	*		*	*	*	

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INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 429 - 1 525	1 429 - 1 525		1 429 - 1 435	1 429 - 1 435		
* * *	* * *		* * *	* * *	* * *	
			1 435 - 1 530	1 435 - 1 530		
1 525 - 1 530	1 525 - 1 530	1 525 - 1 530	* * *	* * *	* * *	
* * *	SPACE OPERATION (space-to-Earth) Earth Exploration-Satellite Fixed Mobile 723 722 723A	* * *				
1 530 - 1 533	1 530 - 1 533		1530 - 1535	1530 - 1535		
SPACE OPERATION (space-to-Earth) MARITIME MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile except aeronautical mobile LAND MOBILE-SATELLITE (space-to-Earth) 722 726 726A	SPACE OPERATION (space-to-Earth) MARITIME MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile 723 LAND MOBILE-SATELLITE (space-to-Earth) 722 726 726A		MARITIME MOBILE SATELLITE (space-to-Earth) Mobile (aeronautical telemetering)	MARITIME MOBILE SATELLITE (space-to-Earth) Mobile (aeronautical telemetering)	* * *	

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 533 - 1 535	1 533 - 1 535					
SPACE OPERATION (space-to-Earth) MARITIME MOBILE-SATELLITE (space-to-Earth) Earth Explorat-ion-Satellite	SPACE OPERATION (space-to-Earth) MARITIME MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite					
Fixed Mobile except aeronautical mobile	Fixed Mobile 723					
Land mobile-satellite (space-to-Earth) 726B	Land mobile-satellite (space-to-Earth) 726B					
722 726 726A	722 726 726A		722 726A US78 US272	722 726A US78 US272		

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INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS		
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)		Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)		(7)
1 535 - 1 544 MARITIME MOBILE-SATELLITE (space-to-Earth) Land Mobile-Satellite (space-to-Earth) 726B 722 726A 727			1 535 - 1 544 MARITIME MOBILE-SATELLITE (space-to-Earth) 722 726A	1 535 - 1 544 MARITIME MOBILE SATELLITE (space-to-Earth) 722 726A	* * *		
1 544 - 1 545 MOBILE-SATELLITE (space-to-Earth) 722 727 727A			1 544 - 1 545 MOBILE-SATELLITE (space-to-Earth) 722 727A	1 544 - 1 545 MOBILE-SATELLITE (space-to-Earth) 722 727A	* * *		
1 545 - 1 555 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth) 722 726A 727 729 729A 730			1 545 - 1 549.5 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth) Mobile-Satellite (space-to-Earth) 722 726A US308 US309	1 545 - 1 549.5 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth) Mobile-Satellite (space-to-Earth) 722 726A US308 US309	* * *		

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
			1549.5 - 1558.5 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 722 726A US308 US309	1549.5 - 1558.5 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 722 726A US308 US309	* * *	
1 555 - 1 559 LAND MOBILE-SATELLITE (space-to-Earth) 722 726A 727 730 730A			1558.5 - 1559 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth) 722 726A US308 US309	1558.5 - 1559 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth) 722 726A US308 US309	* * *	
1 559 - 1 610 AERONAUTICAL RADIONAVIGATION RADIONAVIGATION-SATELLITE (space-to-Earth) 722 727 730 731 731A 731B 731C 731D			1 559 - 1 610 AERONAUTICAL RADIONAVIGATION-SATELLITE (space-to-Earth) 722 US208 US260	1 559 - 1 610 AERONAUTICAL RADIONAVIGATION-SATELLITE (space-to-Earth) 722 US208 US260	* * *	

§ 2.106 Table of Frequency Allocations

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 610 - 1 626.5 AERONAUTICAL RADIONAVIGATION 722 727 730 731 731A 731B 731D 732 733 733A 733B 733E 733F 734	1 610 - 1 626.5 AERONAUTICAL RADIONAVIGATION RADIODETERMINAT-ION-SATELLITE (Earth-to-space) 733A 722 731B 731C 732 733 733C 733D 734	1 610 - 1 626.5 AERONAUTICAL RADIONAVIGATION Radiodeterminat-ion-satellite (Earth-to-space) 733A 733E 722 727 730 731B 731C 732 733 733B 734	1 610 - 1626.5 AERONAUTICAL RADIONAVIGATION 722 732 733 734 US208 US260 US306	1 610 - 1626.5 AERONAUTICAL RADIONAVIGATION 722 732 733 734 US208 US260 US306	AVIATION (87). SATELLITE COMMUNICATION (25).	

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INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 626.5 - 1 631.5 MARITIME MOBILE-SATELLITE (Earth-to-space) Land mobile-satellite 726B (Earth-to-space) 722 726A 727 730			1626.5 - 1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space)	1626.5 - 1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space)	* * *	
1 631.5 - 1 634.5 MARITIME MOBILE-SATELLITE (Earth-to-space) LAND MOBILE-SATELLITE (Earth-to-space) 722 726A 727 730 734A						
1 634.5 - 1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space) Land mobile-satellite 726B (Earth-to-space) 722 726A 727 730			722 726A	722 726A		

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 645.5 - 1 646.5			1645.5 - 1646.5	1645.5 - 1646.5		
	MOBILE-SATELLITE (Earth-to-space)		MOBILE-SATELLITE (Earth-to-space)	MOBILE-SATELLITE (Earth-to-space)	* * *	
	722 734B		722 734B	722 734B		
1 646.5 - 1 656.5			1646.5 - 1651	1646.5 - 1651		
	AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space)		AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space) Mobile-Satellite (Earth-to-space)	AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space) Mobile-Satellite (Earth-to-space)	* * *	
	722 726A 727 729A 730 735		722 726A US308 US309	722 726A US308 US309		

§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
			1651 - 1660	1651 - 1660		
1 656.5 - 1 660			AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space) MOBILE-SATELLITE (Earth-to-space)	AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space) MOBILE-SATELLITE (Earth-to-space)	* * *	
LAND MOBILE-SATELLITE (Earth-to-space)						
722 726A 727 730 730A 734A			722 726A US308 US309	722 726A US308 US309		
1 660 - 1 660.5			1660 - 1660.5	1660 - 1660.5		
RADIO ASTRONOMY LAND MOBILE-SATELLITE (Earth-to-space)			AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space) RADIO ASTRONOMY	AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space) RADIO ASTRONOMY	* * *	
722 726A 730A 736			722 726A 736 US309	722 726A 736 US309		
*	*		*	*	*	

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INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1 700 - 1 710	1 700 - 1 710		1 700 - 1 710	1 700 - 1 710		
FIXED	* * *		* * *	* * *		
METEOROLOGICAL-SATELLITE (space-to-Earth)						
Mobile except aeronautical mobile						
671 722 743A						
1 710 - 2 290	1 710 - 2 290		1 710 - 1 850	1 710 - 1 850		
FIXED	* * *		* * *	* * *		
Mobile						
			1 850 - 1 990	1 850 - 1 990		
			* * *	* * *	* * *	
722 743A 744						
746 747 748						
750			1 990 - 2 110	1 990 - 2 200		
			* * *	MOBILE	* * *	
				Fixed		
			2 110 - 2 200			
			* * *	US90 US111 US219 US222 NG23 NG118		

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
			2 200 - 2 290	2 200 - 2 290		
			* * *	* * *		
2 290 - 2 300	2 290 - 2 300		2 290 - 2 300	2 290 - 2 300		
FIXED SPACE RESEARCH (space-to-Earth) (deep space) Mobile except aeronautical mobile 743A	* * *		* * *	* * *		

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2 300 - 2 450	2 300 - 2 450		2 300 - 2 310	2 300 - 2 310		
FIXED Amateur Mobile Radiolocation	* * *		* * *	* * *	* * *	
			2 310 - 2 390	2 310 - 2 390		
			* * *	* * *		
			2 390 - 2 450	2 390 - 2450		
664 743A 752			* * *	* * *	* * *	
2 450 - 2 483.5	2 450 - 2 483.5		2 450 - 2483.5	2 450 - 2483.5		
FIXED MOBILE Radiolocation	FIXED MOBILE RADIOLOCATION		* * *	* * *		
752 753	752					
2 483.5 - 2 500	2 483.5 - 2 500	2 483.5 - 2 500	2 483.5 - 2 500	2 483.5 - 2 500		
FIXED MOBILE Radiolocation	FIXED MOBILE RADIODETERMINATI- ON-SATELLITE 753A (space-to-Earth) RADIOLOCATION	FIXED MOBILE RADIOLOCATION Radiodeterminat- ion-satellite (spase-to-Earth) 753A		RADIODETERMIN- ATION-SATELLITE (space-to-Earth)	SATELLITE COMMUNICATION (25).	
733F 752 753A 753B 753C 753E	752 753D	752 753C	752 US41	752 US41 NG147		

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2 500 - 2 655	2 500 - 2 655	2 500 - 2 535	2 500 - 2 655	2 500 - 2 655		
* * *	* * *	FIXED 762 764 FIXED-SATELLITE (space-to-Earth) 761 MOBILE except aeronautical mobile BROADCASTING-SATELLITE 757 760 754 754A	* * *	* * *		
		2 535 - 2 655				
		* * *				
*		*	*	*	*	

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INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2 900 - 3 100			2 900 - 3 100	2 900 - 3 100		
RADIONAVIGATION 773 Radiolocation			MARITIME RADIONAVIGATION Radiolocation 775A	MARITIME RADIONAVIGATION Radiolocation 775A	* * *	
772 775A			US44 G56	US44		
3 100 - 3 300			3 100 - 3 300	3 100 - 3 300		
RADIOLOCATION			RADIOLOCATION	RADIOLOCATION		
713 777 778			713 778 US110 G59	713 778 US110		

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	GOVERNMENT Allocation MHz	NON-GOVERNMENT Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
5 000 - 5 250			5 000 - 5 250	5 000 - 5 250		
AERONAUTICAL RADIONAVIGATION			AERONAUTICAL RADIONAVIGATION	AERONAUTICAL RADIONAVIGATION	AVIATION (87). SATELLITE COMMUNICATION (25).	
733 796 797 797A 797B			733 796 797 797A US211 US260 US307	733 796 797 797A US211 US260 US307		
*	*		*	*	*	
5 470 - 5 650			5 470 - 5 600	5 470 - 5 600		
MARITIME RADIONAVIGATION Radiolocation			MARITIME RADIONAVIGATION Radiolocation	MARITIME RADIONAVIGATION Radiolocation	* * *	
			US50 US65 G56	US50 US65		
			5 600 - 5 650	5 600 - 5 650		
800 801 802			* * *	* * *	* * *	
*	*		*	*	*	

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§ 2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
			GOVERNMENT	NON-GOVERNMENT		
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Allocation MHz	Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
9 200- 9 300 RADIOLOCATION MARITIME RADIONAVIGATION 823 824 824A			9 200 - 9 300 MARITIME RADIONAVIGATION Radiolocation US110 G59 823 824A	9 200 - 9 300 MARITIME RADIONAVIGATION Radiolocation US110 823 824A		
9 300 - 9 500 RADIONAVIGATION 825A Radiolocation 775A 824A 825			9 300 - 9 500 RADIONAVIGATION 825A Meteorological Aids Radiolocation 775A 824A US51 US66 US67 US71 G56	9 300 - 9 500 RADIONAVIGATION 825A Meteorological Aids Radiolocation 775A 824A US51 US66 US67 US71		

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INTERNATIONAL FOOTNOTES

[448] The use of the bands 14-19.95 kHz, 20.05-70 kHz and 70-90 kHz (72-84 kHz and 86-90 kHz in Region 1) by the maritime mobile service is limited to coast radiotelegraph stations (A1A and F1B only). Exceptionally, the use of class J2B or J7B emissions is authorized subject to the necessary bandwidth not exceeding that normally used for class A1A or F1B emissions in the band concerned.

[451] In the bands 70-90 kHz (70-86 kHz in Region 1) and 110-130 kHz (112-130 kHz in Region 1), pulsed radionavigation systems may be used on condition that they do not cause harmful interference to other services to which these bands are allocated.

[453A] In the band 90-110 kHz, the United Kingdom may continue to use its coast radiotelegraph stations in operation on 14 September 1987, on a secondary basis.

[464A] In Region 1, the change of the band limit from 285 kHz to 283.5 kHz shall take place on 1 February 1990 (see Resolution 500).

[466A] *Additional Allocation*: in Region 1, the frequency band 285.3-285.7 kHz is also allocated to the maritime radionavigation service (other than radiobeacons) on a permitted basis.

[469] *Different category of service*: in Afghanistan, Australia, China, the Overseas French Territories of Region 3, India, Indonesia, the Islamic Republic of Iran, Japan, Pakistan, Papua New Guinea and Sri Lanka, the allocation of the band 415-495 kHz to the aeronautical radionavigation service is on a permitted basis. Administrations in these countries shall take all practical steps necessary to ensure that aeronautical radionavigation stations in the band 435-495 kHz do not cause interference to reception by coast stations of ship stations transmitting on frequencies designated for ship stations on a world-wide basis (see No. 4237).

[469A] *Different category of service*: in Cuba, the United States of America, and Mexico the allocation of the band 415-435 kHz to the aeronautical radionavigation service is on a primary basis.

[470A] In Region 2, the use of the band 435-495 kHz by the aeronautical radionavigation service is limited to non-directional beacons not employing voice transmission.

[471] The bands 490-495 kHz and 505-510 kHz shall be subject to the provision of No. 3018 until the entry into force of the reduced guardband in accordance with Resolution 210 (Mob-87).

[472] The frequency 500 kHz is an international distress and calling frequency for Morse radiotelegraphy. The conditions for its use are prescribed in Articles 37, 38, N 38 and 60.

[472A] In the maritime mobile service, the frequency 490 kHz is, from the date of full implementation of the GMDSS (see Resolution 331 (Mob-87)), to be used exclusively for the transmission by coast stations of navigational and meteorological warnings and urgent information to ships, by means of narrow-band direct-printing telegraphy. The conditions for use of the frequency 490 kHz are prescribed in Articles N 38 and 60, and Resolution 329 (Mob-87). In using the band 415-495 kHz for the aeronautical radionavigation service, administrations are requested to ensure that no harmful interference is caused to the frequency 490 kHz.

[474] The conditions for the use of frequency 518 kHz by the maritime mobile service are prescribed in Articles 38, N 38 and 60 (see Resolution 324 (Mob-87) and Article 14A).

[480A] In the band 1605-1705 kHz, in cases where a broadcasting station of Region 2 is concerned, the service area of the maritime mobile stations in Region 1 shall be limited to that provided by ground-wave propagation.

[489] In Region 3, the Loran system operates either on 1850 kHz or 1950 kHz, the bands occupied being 1825-1875 kHz and 1925-1975 kHz respectively. Other services to which the band 1800-2000 kHz is allocated may use any frequency therein on condition that no harmful interference is caused to the Loran system operating on 1850 kHz or 1950 kHz.

[497] In Region 2, except in Greenland, coast stations and ship stations using radiotelephony in the band 2065-2107 kHz shall be limited to class R3E or J3E emission and to a peak envelope power not exceeding 1 kW. Preferably, the following carrier frequencies should be used: 2065.0 kHz, 2079.0 kHz, 2082.5 kHz, 2086.0 kHz, 2093.0 kHz, 2096.5 kHz, 2100.0 kHz and 2103.5 kHz. In Argentina, Brazil and Uruguay, the carrier frequencies 2068.5 kHz and 2075.5 kHz are also used for this purpose, while the frequencies within the band 2072-2075.5 kHz are used as provided in No. 4323 BD.

[500A] The frequencies 2187.5 kHz, 4188 kHz, 6282 kHz, 8375 kHz, 12563 kHz and 16750 kHz are international distress frequencies for digital selective calling. The conditions for the use of these frequencies are prescribed in Article 38.

Note: Effective July 1, 1991, the footnote 500A will read as follows: The frequencies 2187.5 kHz, 4207.5 kHz, 6312 kHz, 8414.5 kHz, 12577 kHz, and 16804.5 kHz are international distress frequencies for digital selective calling. The conditions for the use of these frequencies are prescribed in Article N 38.

[500B] The frequencies 2174.5 kHz, 4177.5 kHz, 6268 kHz, 8357.5 kHz, 12520 kHz and 16675 kHz are international distress frequencies for narrowband direct-printing telegraphy. The conditions for the use of these frequencies are prescribed in Article 38.

Note: Effective July 1, 1991, the footnote 500B will read as follows: The frequencies 2174.5 kHz, 4177.5 kHz, 6268 kHz, 8376.5 kHz, 12520 kHz, and 16695 kHz are international distress frequencies for narrow-band direct-printing telegraphy. The conditions for the use of these frequencies are prescribed in Article N 38.

[554] *Additional allocation*: in Albania, the Federal Republic of Germany, Austria, Belgium, Bulgaria, Cote d'Ivoire, Denmark, Spain, Finland, France, Gabon, Greece, Ireland, Israel, Italy, Jordan, Lebanon, Lybia, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Morocco, Mauritania, Monaco, Nigeria, Norway, the Netherlands, Poland, the German Democratic Republic, the United Kingdom, Senegal, Sweden, Switzerland, Swaziland, Syria, Togo, Tunisia, Turkey and Yugoslavia, the band 47-68 MHz and in Romania, the band 47-58 MHz, are also allocated to the land mobile service on a permitted basis. However, stations of the land mobile service in the countries mentioned in connection with each band referred to in this footnote shall not cause harmful interference to, or claim protection from, existing or planned broadcasting stations of countries other than those mentioned in connection with the band.

[572A] *Additional allocation*: in Afghanistan, the Federal Republic of Germany, Austria, Belgium, Cyprus, Denmark, Egypt, Spain, France, Greece, Israel, Italy, Japan, Jordan, Lebanon, Malta, Morocco, Monaco, Norway, the Netherlands, Portugal, the United Kingdom, Sweden, Switzerland, Syria and Turkey, the band 74.8-75.2 MHz is also allocated to the mobile service on a secondary basis subject to agreement obtained under the procedure set forth in Article 14. In order to ensure that harmful interference is not caused to stations of the aeronautical radionavigation service, stations of the mobile service shall not

be introduced in the band until it is no longer required for the aeronautical radionavigation service by any administration which may be identified in the application of Article 14.

587 *Additional allocation*: in Austria, Bulgaria, Hungary, Israel, Kenya, Mongolia, Poland, Syria, the German Democratic Republic, the United Kingdom, Somalia, Czechoslovakia, Turkey and the USSR, the band 104-108 MHz is also allocated to the mobile, except aeronautical mobile (R), service on a permitted basis until 31 December 1995 and, thereafter, on a secondary basis.

589 *Additional allocation*: in France, Romania, Sweden and Yugoslavia, the band 104-108 MHz is also allocated to the mobile, except aeronautical mobile (R), service on a permitted basis until 31 December 1995.

590A *Additional allocation*: in Afghanistan, the Federal Republic of Germany, Austria, Cyprus, Denmark, Egypt, Spain, France, Israel, Italy, Japan, Jordan, Lebanon, Malta, Morocco, Monaco, Norway, Pakistan, Portugal, the United Kingdom, Sweden, Switzerland, Syria and Turkey, the band 108-111.975 MHz is also allocated to the mobile service on a secondary basis subject to agreement obtained under the procedure set forth in Article 14. In order to ensure that harmful interference is not caused to stations of the aeronautical radionavigation service, stations of the mobile service shall not be introduced in the band until it is no longer required for the aeronautical radionavigation service by any administrations which may be identified in the application of Article 14.

593 In the band 117.975-136 MHz, the frequency 121.5 MHz is the aeronautical emergency frequency and, where required, the frequency 123.1 MHz is the aeronautical frequency auxiliary to 121.5 MHz. Mobile stations of the maritime mobile service may communicate on these frequencies under the conditions laid down in Articles 38 and N38 for distress and safety purposes with stations of the aeronautical mobile service.

594A *Different category of service*: as from 1 January 1990, in Bulgaria, Poland, German Democratic Republic, Romania, Czechoslovakia, Turkey and the USSR, the allocation of the band 136-137 MHz to the aeronautical mobile (OR) service is on a permitted basis.

595 Until 1 January 1990, the band 136-137 MHz is also allocated to the space operation service (space-to-Earth), meterological-satellite service (space-to-Earth) and the space research service (space-to-Earth) on a primary basis. The introduction of stations of the aeronautical mobile (R) service shall only occur after that date. After 1 January 1990, the band 136-137 MHz will also be allocated to the above-mentioned space radiocommunication services on a secondary basis (see Resolution 408 (Mob-87)).

609A Recognizing that the use of the band 149.9-150.05 MHz by the fixed and mobile services may cause harmful interference to the radionavigation-satellite service, administrations are urged not to authorize such use in application No. 342.

613 The frequency 156.8 MHz is the international distress, safety and calling frequency for the maritime mobile VHF radiotelephone service. The conditions for the use of this frequency are contained in Articles 38 and N 38.

In the bands 156-156.7625 MHz, 156.8375-157.45 MHz, 160.6-160.975 MHz and 161.475-162.05 MHz, each administration shall give priority to the maritime mobile service on only such frequencies as are assigned to stations of the maritime mobile service by the administration (see Articles 38, N 38 and 60).

Any use of frequencies in these bands by station of other services to which they are allocated should be avoided in areas where such use might cause harmful interference to the maritime mobile VHF radiocommunication service.

However, the frequency 156.8 MHz and the frequency bands in which priority is given to the maritime mobile service may be used for radiocommunications on inland waterways subject to agreement between interested and affected administrations and taking into account current frequency usage and existing agreements.

613A In the maritime mobile VHF service the frequency 156.525 MHz is to be used exclusively for digital selective calling for distress, safety and calling (see Resolution 323 (Mob-87)). The conditions for the use of this frequency are prescribed in Articles 38, N 38 and 60 and in Appendix 18.

613B *Additional allocation*: in Ireland and in the United Kingdom, the band 161.3875-161.4125 MHz is also allocated to the maritime radionavigation service on a primary basis, subject to agreement obtained under the procedure set forth in Article 14.

621 *Additional allocation*: in the Federal Republic of Germany, Austria, Belgium, Denmark, Spain, Finland, France, Israel, Italy, Liechtenstein, Monaco, Norway, the Netherlands, the United Kingdom, Sweden, Switzerland and Yemen (P.D.R. of), the band 174-223 MHz is also allocated to the land mobile service on a permitted basis. However, the stations of the land mobile service shall not cause harmful interference to, nor claim protection from, broadcasting stations, existing or planned, in countries other than those listed in this footnote.

627A *Additional allocation*: in Canada, the band 216-220 MHz is also allocated to the land mobile service on a primary basis.

642 The frequency 243 MHz is the frequency in this band for use by survival craft stations and equipment used for survival purposes (see Article 38).

645A *Additional allocation*: In Afghanistan, the Federal Republic of Germany, Austria, Belgium, Cyprus, Denmark, Egypt, Spain, France, Greece, Israel, Italy, Japan, Jordan, Malta, Morocco, Monaco, Norway, the Netherlands, Portugal, the United Kingdom, Sweden, Switzerland, Syria and Turkey, the band 328.6-335.4 MHz is also allocated to the mobile service on a secondary basis subject to agreement obtained under the procedure set forth in Article 14. In order to ensure that harmful interference is not caused to stations of the aeronautical radionavigation service, stations of the mobile service shall not be introduced in the band until it is no longer required for the aeronautical radionavigation service by any administration which may be identified in the application of Article 14.

645B Recognizing that the use of the band 399.9-400.05 MHz by the fixed and mobile service may cause harmful interference to the radionavigation satellite service, administrations are urged not to authorize such use in application of No. 342.

649 The use of the band 406-406.1 MHz by the mobile-satellite service is limited to low power satellite emergency position-indicating radiobeacons (see also Articles 38 and N 38).

649A Any emission capable of causing harmful interference to the authorized uses of the band 406-406.1 MHz is prohibited.

660A *Additional allocation*: in Mexico, the bands 430-435 MHz and 438-440 MHz are also allocated on a primary basis to the land mobile service, subject to agreement obtained under the procedure set forth in Article 14.

674 *Different category of service*: in Mexico and Venezuela, the allocation of the band 470-512 MHz to the fixed and mobile service, and in Argentina and Uruguay to the mobile service, is on a primary basis (see No. 425), subject to agreement obtained under the procedure set forth in Article 14.

677A *Additional allocation*: in the Federal Republic of Germany, Austria, Belgium, Cyprus, Denmark, Spain, Finland, France, Ireland, Israel, Italy, Libya, Malta, Morocco, Monaco, Norway, the Netherlands, Portugal, the United Kingdom, Swe-

den, Switzerland, Swaziland, Syria, Tunisia and Turkey, the band 470-790 MHz is also allocated on a secondary basis to the land mobile service, intended for applications ancillary to broadcasting. Stations of the land mobile service in the countries mentioned in this footnote, shall not cause harmful interference to existing or planned stations operating in accordance with the Table of Frequency Allocations in countries other than those listed in this footnote.

686A *Additional allocation*: in the United Kingdom, the band 598-606 MHz is also allocated to the aeronautical radionavigation service on a primary basis until 31 December 1994. All new assignments to stations in the aeronautical radionavigation service in this band are subject to the agreement of the Administrations of the following countries: the Federal Republic of Germany, Belgium, Denmark, Spain, France, Ireland, Luxembourg, Morocco, Norway and the Netherlands.

692A *Additional allocation*: in Cuba, the band 614-890 MHz is also allocated to the radionavigation service on a primary basis, subject to agreement obtained under the procedure set forth in Article 14.

695A *Additional allocation*: in Austria, Italy, the United Kingdom and Swaziland, the band 790-862 MHz is also allocated to the land mobile service on a secondary basis.

697 *Additional allocation*: In the Federal Republic of Germany, Denmark, Egypt, Finland, Israel, Kenya, Libya, Liechtenstein, Monaco, Norway, the Netherlands, Sweden, Switzerland and Yugoslavia, the band 790-830 MHz, and in these same countries and in Spain, France, Malta and Syria, the band 830-862 MHz, are also allocated to the mobile, except aeronautical mobile, service in the countries mentioned in connection with each band referred to in this footnote shall not cause harmful interference, or claim protection from, stations of services operating in accordance with the Table in countries other than those mentioned in connection with the band.

700 *Additional allocation*: in Region 2, the band 806-890 MHz is also allocated to the mobile-satellite service on a primary basis. The use of this service is intended for operation within national boundaries and subject to agreement obtained under the procedure set forth in Article 14.

701 *Additional allocation*: in Region 3, the bands 806-890 MHz and 942-960 MHz are also allocated to the mobile-satellite, except aeronautical mobile-satellite (R), service on a primary basis. The use of this service is limited to operation within national boundaries and subject to agreement obtained under the procedure set forth in Article 14. In seeking such agreement, appropriate protection shall be afforded to services operating in accordance with the Table, to ensure that no harmful interference is caused to such services.

704A *Additional allocation*: in Brazil, Canada and the United States of America, the band 890-896 MHz is also allocated to the mobile-satellite service on a primary basis. The use of this service is intended for operation within national boundaries and subject to agreement obtained under the procedure set forth in Article 14. In seeking such agreement, appropriate protection shall be afforded to services operating in accordance with the Table.

707A *Different category of service*: in Chile, the band 903-905 MHz is allocated to the mobile, except aeronautical mobile, service on a primary basis and is subject to agreement obtained under the procedure set forth in Article 14.

712A *Additional allocation*: in Cuba, the band 1215-1300 MHz is also allocated to the radionavigation service on a primary basis subject to the agreement obtained under the procedure set forth in Article 14.

723A *Different category of service*: in Cuba, the band 1525-1530 MHz is allocated to the aeronautical mobile service on a primary basis, under the conditions specified in No. 723.

726A The bands 1530-1544 MHz, 1545-1559 MHz, 1626.5-1645.5 MHz and 1646.5-1660.5 MHz shall not be used for feeder links of any service. In exceptional circumstances, however, an earth station at a specified fixed point in any of the mobile-satellite services may be authorized by an administration to communicate via space stations using these bands.

726B The use of the bands 1533-1544, 1626.5-1631.5 and 1634.5-1645.5 MHz by the land mobile-satellite service is limited to non-speech low bit-rate data transmissions.

727A The use of the band 1544-1545 MHz by the mobile-satellite service (space-to-earth) is limited to distress and safety communications (see Article N 38).

729 Transmissions in the band 1545-1555 MHz from terrestrial aeronautical stations directly to aircraft stations, or between aircraft stations, in the aeronautical mobile (R) service are also authorized when such transmissions are used to extend or supplement the satellite-to-aircraft links.

729A Notwithstanding any other provisions of the Radio Regulations relating to restrictions in the use of the bands allocated to the aeronautical mobile-satellite (R) service for public correspondence, the bands 1545-1555 MHz and 1646.5-1656.5 MHz may be authorized by administrations for public correspondence with aircraft earth stations. Such communications must cease immediately, if necessary, to permit transmission of messages with priority 1 to 6 in Article 51.

730A In the bands 1555-1559 and 1656.5-1660.5 MHz administrations may also authorize aircraft earth stations and ship earth stations to communicate with space stations in the land mobile-satellite service (see Resolution 208 (Mob-87)).

731 *Alternative allocation*: in Sweden, the band 1590-1626.5 MHz is allocated to the aeronautical radionavigation service on a primary basis.

731A In Region 1, stations of the aeronautical mobile service using the bands 1593-1594 MHz and 1625.5-1626.5 MHz shall not claim protection from, or cause harmful interference to, stations of the aeronautical radionavigation and radionavigation services, as applicable.

731B *Additional allocation*: the bands 1593-1594 MHz and 1625.5-1626.5 MHz are also allocated to the aeronautical mobile service in Region 1 (except in Syria and Tunisia) on a primary basis, and in Regions 2 and 3 (and in Syria and Tunisia) on a secondary basis. The use of these bands in the aeronautical mobile service is limited to public correspondence with aircraft (see Recommendation 408 (Mob-87)). The use of the band 1593-1594 MHz is limited to transmissions from aeronautical stations and the use of the band 1625.5-1626.5 MHz is limited to transmissions from aircraft stations.

731C *Different category of service*: the bands listed in No 731B are allocated, subject to agreement obtained in accordance with the procedures set forth in Article 14, to the aeronautical mobile service on a primary basis in Greenland, the French Overseas Territories in Regions 2 and 3, Bermuda, British Virgin Islands, Cayman Islands, Montserrat and Pitcairn Island (see Recommendation 408 (Mob-87)).

731D In Region 1, stations of the aeronautical mobile service using the bands 1593-1594 MHz and 1625.5-1626.5 MHz shall not cause harmful interference to stations of the fixed service operating in the countries listed in No. 730.

733A In respect of the radiodetermination-satellite service the provisions of No. 953 do not apply in the frequency band 1610-1626.5 MHz.

733B *Different category of service*: in Angola, Australia, Burundi, Cote d'Ivoire, Ethiopia, India, Islamic Republic of Iran, Israel, Italy, Jordan, Kenya, Lebanon, Liberia, Libya, Madagascar, Mali, Pakistan, Papua New Guinea, Senegal, Sudan, Swaziland, Syria, Tanzania, Thailand, Togo, Zaire and Zambia the allocation of the band 1610-1626.5 MHz to the radiodetermination-satellite service (Earth-to-space) is on a primary basis (see No. 425) subject to agreement obtained under the procedure set forth in Article 14 with other countries not listed in this provision.

733C *Different category of service*: in Venezuela, the allocation to the radiodetermination-satellite service in the band 1610-1626.5 MHz is allocated exclusively to the aeronautical radionavigation service on a secondary basis.

733D *Alternative allocation*: in Cuba, the band 1610-1626.5 MHz is allocated exclusively to the aeronautical radionavigation service on a primary basis.

733E In Regions 1 and 3 harmful interference shall not be caused to stations of the radioastronomy service using the band 1610.6-1613.8 MHz by stations of the radiodetermination-satellite service.

733F In Region 1, the bands 1610-1626.5 MHz (Earth-to-space) and 2483.5-2500 MHz (space-to-Earth) are also allocated to the radiodetermination-satellite service on a secondary basis.

734A Land earth stations and ship earth stations in the mobile-satellite services operating in the bands 1631.5-1634.5 and 1656.5-1660 MHz shall not cause harmful interference to the stations in the fixed service operating in the countries listed in No. 730.

734B The use of the band 1645.5-1646.5 MHz by the mobile satellite service (Earth-to-space) and for inter-satellite links is limited to distress and safety communications (see Article N 38).

735 Transmissions in the band 1646.5-1656.5 MHz from aircraft stations in the aeronautical mobile (R) service directly to terrestrial aeronautical stations, or between aircraft stations, are also authorized when such transmissions are used to extend or supplement the aircraft-to-satellite links.

743A *Different category of service*: in the Federal Republic of Germany, Austria, Denmark, Finland, Israel, Norway, the Netherlands, the United Kingdom, Switzerland and Syria, in the band 1700-2450 MHz, in Sweden in the bands 1700-1710 MHz and 2290-2450 MHz and in Yugoslavia in the band 2300-2450 MHz, the allocation to the land mobile service is on a primary basis (see No. 425), subject to agreement obtained under the procedure set forth in Article 14.

753 *Alternative allocation*: in France, the bands 2450-2483.5 MHz and 2500-2550 MHz are allocated on a primary basis to the radiolocation service and on a secondary basis to the fixed and mobile services (see Nos. 424 and 425). Such use in subject to agreement with the administrations having services operating or planned to operate in accordance with the Table which may be affected.

753A In respect of the radiodetermination-satellite service in the band 2483.5-2500 MHz, the provisions of No. 953 do not apply.

753B In Region 1, in countries other than those listed in No. 753C, harmful interference shall not be caused to, or protection shall not be claimed from, stations of the radiolocation service by stations of the radiodetermination-satellite service.

753C *Different category of service*: in Angola, Australia, Burundi, Cote d'Ivoire, Ethiopia, India, Islamic Republic of Iran, Israel, Italy, Jordan, Kenya, Lebanon, Liberia, Libya, Madagascar, Mali, Pakistan, Papua New Guinea, Senegal, Sudan, Swaziland, Syria, Tanzania, Thailand, Togo, Zaire and Zambia, the allocation of the band 2483.5-2500 MHz to the radiodetermination-satellite service (space-to-Earth) is on a primary basis (see No. 425) subject to agreement obtained under the procedure of Article 14 with other countries not listed in this provision.

753D *Alternative allocation*: in Cuba, the band 2483.5-2500 MHz is allocated only to fixed, mobile and radiolocation services on a primary basis.

753E *Alternative allocation*: in France, the band 2483.5-2500 MHz is allocated on a primary basis to the radiolocation service and on a secondary basis to the mobile service (see Nos. 424 and 425). Such use is subject to agreement with the administrations having services operating or planned to operate in accordance with the Table which may be affected.

754A *Additional allocation*: subject to agreement obtained under the procedure set forth in Article 14, the band 2500-2516.5 MHz may also be used in India, the Islamic Republic of Iran, Papua New Guinea and Thailand for the radiodetermination-satellite service (space-to-Earth) for operation limited to within national boundaries.

772 In the band 2900-3100 MHz, the use of the shipborne interrogator-transponder system (SIT) shall be confined to the sub-band 2930-2950 MHz.

775A In the bands 2900-3100 MHz and 9300-9500 MHz, the response from radar transponders shall not be capable of being confused with the response from radar beacons (racons) and shall not cause interference to ship or aeronautical radars in the radionavigation service, having regard, however, to No. 347 of these Regulations.

797A *Additional allocation*: in the countries listed in Nos. 733B and 753C, and subject to agreement obtained under the procedure set forth in Article 14, the band 5150-5216 MHz is also allocated to the radiodetermination-satellite service (space-to-Earth) on a primary basis. In Region 2, the band is also allocated to the radiodetermination-satellite service (space-to-Earth) on a primary basis. In Regions 1 and 3, except those countries listed in Nos. 733B and 753C, the band is also allocated to the radiodetermination-satellite service (space-to-Earth) on a secondary basis. The use by the radiodetermination-satellite service is limited to feeder links in conjunction with the radiodetermination-satellite service operating in the bands 1610-1626.5 MHz and/or 2483.5-2500 MHz. The total power flux-density at the Earth's surface shall in no case exceed -159 dBW/m^2 in any 4 kHz band for all angles of arrival.

797B *Additional allocation*: in the Federal Republic of Germany, Austria, Denmark, Spain, France, Finland, Israel, Italy, Jordan, Morocco, Norway, the Netherlands, Pakistan, the United Kingdom, Sweden, Switzerland, Syria and Tunisia, the band 5150-5250 MHz is also allocated to the mobile service, on a primary basis, subject to the agreement obtained under the procedure set forth in Article 14.

824A In the band 9200-9500 MHz, search and rescue transponders (SART) may be used, having due regard to the appropriate CCIR Recommendation (see also Article N 38).

825A In the band 9300-9320 MHz in the radionavigation service, the use of shipborne radars, other than those existing on 1 January 1976, is not permitted until 1 January 2001.

UNITED STATES (US) FOOTNOTES

US14 When 500 kHz is being used for distress purposes, ship and coast stations using morse telegraph may use 512 kHz for calling.

US82 Until July 1, 1991, the assignable frequencies in the bands 4143.6-4146.6 kHz, 6218.6-6224.6 kHz, 8291.1-8297.3 kHz, 12429.2-12439.5 kHz, 16587.1-16596.4 kHz and 22124-22139.5 kHz

may be authorized on a shared nonpriority basis to Government and non-Government ship and coast stations (SSB telephony, with peak envelope power not to exceed 1 kW). Effective July 1, 1991, the assignable frequencies in the bands 4146-4152 kHz, 6224-6233 kHz, 8294-8300 kHz, 12353-12368 kHz, 16528-16549 kHz, 18825-18846 kHz, 22159-22180 kHz, and 25100-25121 kHz may be authorized on a shared non-priority basis to Government and non-Government ship and coast stations (SSB telephony, with peak envelope power not to exceed 1 kW).

US235 Until implementation procedures and schedules are determined by future conferences of the International Telecommunications Union, the bands 9775-9900 kHz, 11650-11700 kHz, 11975-12050 kHz, 13600-13800 kHz, 15450-15600 kHz, 17550-17700 kHz, and 21750-21850 kHz to be implemented by the broadcasting service are allocated as an alternative allocation to the fixed service. The bands 12230-12330 kHz, 16360-16460 kHz, 17360-17410 kHz, 18780-18900 kHz, 19680-19800 kHz, 22720-22855 kHz, 25110-25210 kHz, and 26100-26175 kHz to be implemented by the maritime mobile service are also allocated as an alternative allocation to the fixed service until July 1, 1991, when these bands are to be allocated exclusively to the maritime mobile service.

US236 Until implementation procedures and schedules are determined by future conferences of the International Telecommunications Union (*See* Resolution 319), the bands 4000-4063 and 8100-8195 kHz are also allocated on a primary basis to the fixed service.

US284 Until July 1, 1991, the carrier frequencies 6451.9 and 6455.0 kHz may be authorized to non-Government ship telephone and coast telephone stations operating in the Mississippi River maritime mobile service system on the condition that harmful interference will not be caused to services operating in accordance with the Table of Frequency Allocations and that any interference from such services must be accepted.

US285 Under exceptional circumstances, the carrier frequency 2635, 2638, and 2738 kHz may be authorized to coast stations.

US296 Until July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4160.6, 4168, 6238.6, 6242.6, 8326, 8341.5, 12485, 12489, 16654, 16658, 22186 and 22190 kHz. Effective July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4154, 4170, 6235, 6259, 8302, 8338, 12370, 12418, 16551, 16615, 18848, 18868, 22182, 22238, 25123, and 25159 kHz.

US307 The sub-band 5150-5216 MHz is also allocated for space-to-Earth transmissions in the fixed satellite service for feeder links in conjunction with the radiodetermination satellite service operating in the bands 1610-1626.5 MHz and 2483.5-2500 MHz. The total power flux density at the earth's surface shall in no case exceed -159 dBW/m per 4 kHz for all angles of arrival.

US309 Transmissions in the bands 1545-1559 MHz from terrestrial aeronautical stations directly to aircraft stations, or between aircraft stations, in the aeronautical mobile (R) service are also authorized when such transmissions are used to extend or supplement the satellite-to-aircraft links. Transmissions in the band 1646.5-1660.5 MHz from aircraft stations in the aeronautical mobile (R) service directly to terrestrial aeronautical stations, or between aircraft stations, are also authorized when such transmissions are used to extend or supplement the aircraft-to-satellite links.

5. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 to 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. § 54. Interpret or apply Secs. 101-104, 76 Stat 419-427; 47 U.S.C. 701-744.

6. Section 25.201 is amended by revising the definition for *Radiodetermination-Satellite Service* and adding the others in the correct alphabetical position to read as follows:

§ 25.201 Definitions.

Base Earth Station. An earth station in the fixed-satellite service or, in some cases, in the land mobile-satellite service, located at a specified fixed point or within a specified area on land to provide a feeder link for the land mobile-satellite service.(RR)

Land Earth Station. An earth station in the fixed-satellite service or, in some cases, in the mobile-satellite service, located at a specified fixed point or within a specified area on land to provide a feeder link for the mobile-satellite service.(RR)

Land Mobile Earth Station. A mobile earth station in the land mobile-satellite service capable of surface movement within the geographical limits of a country or continent.(RR)

Radiodetermination-Satellite Service. A radiocommunication service for the purpose of radiodetermination involving the use of one of more space stations. This service may also include feeder links necessary for its own operation.(RR)

7. In Section 25.202, paragraph (a)(2) is revised to read as follows:

§ 25.202. Frequencies, frequency tolerance and emission limitations.

(a)* * *

(2) The following frequencies are available for use by the Radiodetermination Satellite Service:

1610-1626.5 MHz: User-to-Satellite Link

2483.5-2500 MHz: Satellite-to-User Link

Fixed-Satellite service frequencies may be used for links between radiodetermination satellites and control centers, including the following designated bands, subject to the Rules in this subpart:

5150-5216 MHz: Satellite-to-Control Center Link

6525-6541.5 MHz: Control Center-to-Satellite Link

* * * * *

8. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

9. The table of contents for Part 80, Subpart X is amended by revising the center heading entitled "SATELLITE STATIONS" and the section heading of §80.1185 to read as follows:

PART 80 -- STATIONS IN THE MARITIME SERVICES

* * * * *

Subpart X - Voluntary Radio Installations

* * * * *

MOBILE-SATELLITE STATIONS

80.1185 Supplemental eligibility for mobile-satellite stations.

* * * * *

10. Section 80.142 is amended by revising paragraph (b) and removing paragraphs (b)(1) through (9) to read as follows:

§ 80.142 Ships using radiotelegraphy.

* * * * *

(b) *NB-DP operating procedure*. The operation of NB-DP equipment in the maritime mobile service must be in accordance with the operating procedures contained in the latest version of CCIR Recommendation 492 that does not prevent the use of existing equipment.

* * * * *

11. In Section 80.207, the table following paragraph (d) is amended by revising it to read as follows:

§ 80.207 Classes of emission.

* * * * *

(d) The authorized classes of emission are as follows:

Types of stations	Classes of emission
Ship Stations[1]	
Radiotelegraphy:	
100-160 kHz	A1A
405-525 kHz	A1A, J2A
1605-27500 kHz:	
Manual	A1A, J2A
DSC	F1B, J2B
NB-DP	F1B, J2B
Facsimile	F1C, F3C, J2C, J3C
156-162 MHz[2]	F1B, F2B, F2C, F3C
DSC	G2B
216-220 MHz[3]	F1B, F2B, F2C, F3C
1626.5-1646.5 MHz	([4])

* * * * *

Land Stations[1]	
Radiotelegraphy:	
100-160 kHz	A1A
405-525 kHz	A1A, J2A
1605-2850 kHz:	
Manual	A1A, J2A
Facsimile	F1C, F3C, J2C, J3C
Alaska-Fixed	A1A, J2A
4000-27500 kHz:	
Manual	A1A, J2A
DSC	F1B, J2B
NB-DP	F1B, J2B
Facsimile	F1C, F3C, J2C, J3C
Alaska-Fixed	A1A, A2A, F1B, F2B
72-76 MHz	A1A, A2A, F1B, F2B
156-162 MHz[2]	F1B, F2B, F2C, F3C
DSC	G2B
216-220 MHz[3]	F1B, F2B, F2C, F3C

* * * * *

12. Section 80.209 is amended by revising the table paragraphs (a)(1)(i) and (ii), (a)(2)(i) and (ii), (a)(3)(i) and (ii) and the subsequent table footnotes as follows:

§ 80.209 Transmitter frequency tolerances.

(a) * * *

Frequency bands and categories of stations	Tolerances applicable until January 1, 1990, for transmitters installed before January 2, 1987	Tolerances applicable[1] to new transmitters installed after January 1, 1987, and to all transmitters after January 1, 1990
(1) Band 100-525 kHz:		
(i) Coast stations:		
For single sideband emissions.	20 Hz	20 Hz
For narrow-band direct-printing and data emissions.	10 Hz[5]	10 Hz[5]
For digital selective calling emissions.	10 Hz[2]	10 Hz[2]
For all other emissions	200	100
(ii) Ship stations:		
For transmitters with single sideband emission type accepted or type approved before November 30, 1977.	50 Hz	
For transmitters with other emissions type accepted or type approved before November 30, 1977.	1000	
For narrow-band direct-printing and data emissions.	10 Hz[5]	10 Hz[5]
For transmitters with digital selective calling emissions.	20 Hz[3]	10 Hz[3]
For all transmitters type accepted or type approved after November 29, 1977.	20 Hz	20 Hz
(iii) * * *		
(iv) * * *		
(v) * * *		
(2) Band 1600-4000 kHz:		
(i) Coast stations and Alaska fixed stations:		
For single sideband and facsimile emissions.	20 Hz	20 Hz
For narrow-band direct-printing and data emissions.	10 Hz[5]	10 Hz[5]
For digital selective calling emissions.	15 Hz[2]	10 Hz[2]
For all other emissions	50	50
(ii) Ship stations:		
For transmitters with single sideband and facsimile emission type accepted or type approved before November 30, 1977.	50 Hz	
For transmitters with other emissions type accepted or type approved before November 30, 1977.	200	
For narrow-band direct-printing and data emissions.	10 Hz[5]	10 Hz[5]
For transmitters with digital selective calling emissions.	20 Hz[3]	10 Hz[3]
For all transmitters type accepted or type approved after November 29, 1977.	20 Hz	20 Hz
(iii) * * *		
(iv) * * *		
(3) Band 4000-27500 kHz:		
(i) Coast stations and Alaska fixed stations:		
For single sideband and facsimile emissions.	20 Hz	20 Hz
For narrow-band direct-printing and data emissions.	10 Hz[5]	10 Hz[5]
For digital selective calling emissions.	15 Hz[2]	10 Hz[2]
For Morse telegraphy emissions.	15	10
For all other emissions	15	15
(ii) Ship stations:		
For transmitters with Morse telegraphy emission type accepted or type approved before November 30, 1977.	200 Hz	
For transmitters with other emissions type accepted or type approved before November 30, 1977.	50 Hz	
For narrow-band direct-printing and data emissions.	10 Hz[5]	10 Hz[5]
For transmitters with digital selective calling emissions.	20 Hz[3]	10 Hz[3]
For all other transmitters type accepted or type approved after November 29, 1977.	20 Hz	20 Hz
(iii) * * *		

* * * * *

[1] Transmitters authorized prior to January 2, 1990, with frequency tolerances equal to or better than those required after this date will continue to be authorized in the maritime services provided they retain type acceptance and comply with the applicable standards in this part.

[2] Until January 1, 1990, the frequency tolerance for DSC coasts station transmitters in the MF and HF bands is 15 Hz. Thereafter, the frequency tolerance for DSC coast station transmitters in the MF and HF bands is 10 Hz.

[3] Until February 2, 1999, the frequency tolerance for DSC ship station transmitters in the MF and HF bands that were installed before January 2, 1992, is 20 Hz. The frequency tolerance for DSC ship station transmitters in the MF and HF bands installed after January 1, 1992, is 10 Hz. On February 2, 1999, the frequency tolerance for all DSC ship station transmitters in the MF and HF bands (regardless of installation date) is 10 Hz.

[4] For transmitters in the radiolocation and associated telecommand service operating on 154.585 MHz, 159.480 MHz, 160.725 MHz, and 160.785 MHz the frequency tolerance is 15 parts in 10^6.

[5] The frequency tolerance for narrow-band direct-printing and data transmitters installed before January 2, 1992, is 15 Hz for coast stations and 20 Hz for ship stations. The frequency tolerance for new narrow-band direct-printing and data transmitters installed after January 1, 1992, is 10 Hz.

* * * * *

13. In Section 80.211, paragraph (a)(1) is revised to read as follows:

§ 80.211 Emission limitations.

* * * * *

(a) * * *

(1) On any frequency removed from the assigned frequency by more than 50 percent up to and including 150 percent of the authorized bandwidth: at least 25 dB for transmitters installed before February 1, 1992, at least 28 dB for transmitters installed on or after February 1, 1992;

* * * * *

14. Section 80.215 is amended by adding a new paragraph (d)(3) to read as follows:

§ 80.215 Transmitter power.

* * * * *

(d) * * *

(3) Digital selective calling:

All ships 415-526.5 kHz -- 400 W
All ships 1605-4000 kHz -- 400 W
All ships 4000-27500 kHz -- 1.5 kW

* * * * *

15. Section 80.219 is revised in its entirety to read as follows:

§ 80.219 Special requirements for narrow-band direct-printing (NB-DP) equipment.

NB-DP and data transmission equipment installed in ship and coast stations before October 1, 1990, that operate on frequencies in the 4000-27500 kHz bands must conform to the technical requirements of CCIR Recommendations 476 or 625. Equipment installed on or after October 1, 1990, must conform to the technical requirements of CCIR Recommendation 625. Equipment installed before October 1, 1990, and built in accordance with CCIR Recommendation 476, however, may continue to be used.

16. In Section 80.359, paragraph (a) is revised in its entirety to read as follows:

§ 80.359 Frequencies for digital selective calling (DSC).

(a) *General purpose calling.* The following tables describe the DSC frequencies that are assignable to ship and coast stations for general purpose calling.

Ship Transmit
(in kHz unless otherwise noted)

458.5	8375.5	16751.0
2177.0[1]	12562.0	22248.0
2189.5	12562.5	22248.5
4187.5	16750.5	156.525 MHz
6281.5		

[1] The frequency 2177.0 kHz is available to ship stations for intership calling and acknowledgement of such calls only.

Coast Transmit
(in kHz unless otherwise noted)

455.5	8718.5	17232.5
2177.0	13100.0	22595.0
4357.0	13100.5	22595.5
6506.0	17232.0	156.525 MHz

* * * * *

17. Section 80.369 is amended by revising paragraph (a) and adding new paragraphs (a)(1) and (2) to read as follows:

§ 80.369 Distress, urgency, safety, call and reply frequencies.

* * * * *

(a) In the 1605-3500 kHz band, the frequency 2182 is an international radiotelephony distress, urgency and safety frequency for ship stations, public and private coast stations, and survival craft stations. It is also used for call and reply by ship stations on a primary basis and by public coast stations on a secondary basis. The carrier frequency 2191 kHz may be used as a supplementary

calling frequency in areas of heavy usage of 2182 kHz. All stations must use J3E emission when operating on 2182 and 2191 kHz, except that:

(1) H3E emission may be used on 2182 kHz for communications with foreign coast and ship stations; or,

(2) A3E emission may be used on 2182 kHz by portable survival craft stations, or transmitters authorized for use prior to January 1, 1972. *See* § 80.203(c).

* * * * *

18. Section 80.1185 is amended by revising the center heading entitled "SATELLITE STATIONS" and its section heading to read as follows:

MOBILE-SATELLITE STATIONS

§ 80.1185 Supplemental eligibility for mobile-satellite stations.

* * * * *

19. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

20. Section 87.5 is amended by adding the following definitions in the correct alphabetical position to:

§ 87.5 Definitions.

Aeronautical Mobile Off-Route (OR) Service. An aeronautical mobile service intended for communications, including those relating to flight coordination, primarily outside national or international civil air routes.(RR)

Aeronautical Mobile Route (R) Service. An aeronautical mobile service reserved for communications relating to safety and regularity of flight, primarily along national or international civil air routes.(RR)

Aeronautical Mobile-Satellite Off-Route (OR) Service. An aeronautical mobile-satellite service intended for communications, including those relating to flight coordination, primarily outside national and international civil air routes.(RR)

Aeronautical Mobile-Satellite Route (R) Service. An aeronautical mobile-satellite service reserved for communications relating to safety and regularity of flights, primarily along national or international civil air routes.(RR)

21. In Section 87.187, paragraphs (o) and (x) are revised to read as follows:

§ 87.187 Frequencies.

* * * * *

(o) The frequency band 1435-1535 MHz is available for telemetering and telecommand associated with the flight testing of aircraft, missiles, or related major components. This includes launching into space, reentry into the earth's atmosphere and incidental orbiting prior to reentry. The following frequencies are shared with flight telemetering mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz. *See* 87.303(d).

* * * * *

(x) Frequencies for public correspondence between ships and public coast stations in the maritime mobile service (except frequencies in the 156-174 MHz band) and coast earth stations in the maritime mobile-satellite service are available for public correspondence between aircraft and public coast stations and coast earth stations, respectively. The transmission of public correspondence from aircraft must not cause interference to maritime communications.

* * * * *

FOOTNOTES

[1] The remaining revisions of 1987 Mobile WARC will be treated in subsequent rule making proceedings. *See* Public Notice entitled *Implementation of the 1987 WARC for Mobile Services*, 3 FCC Rcd 6780 (1988).

[2] Amendments by the 1987 Mobile WARC enacted manditory requirements for full-time radio equipment maintainers to be on board vessels. To permit flexibility of options, the U.S. joined with 23 other countries in reservations against the mandatory requirements. This matter will be addressed in the subsequent GMDSS proceeding. *See* Public Notice, *supra*.

[3] Because of the magnitude of the revisions to the Radio Regulations, three rule making proceedings are planned to incorporate the changes into the Commission's Rules: (1) the instant proceeding containing those provisions that enter into force in 1989; (2) a second proceeding incorporating the HF band (4000-27500 kHz) revisions that become effective in 1991; and (3) a final proceeding implementing the GMDSS in the maritime service. *See* Public Notice, *supra*.

[4] Notice of Proposed Rule Making, GEN Docket No. 89-103, FCC 89-125, 54 Fed. Reg. 20869 (1989), 4 FCC Rcd 4173 (1989). The FCC and other government agencies held several meetings during 1988 to consider the changes resulting from the 1987 Mobile WARC, including the Table of Frequency Allocations. The coordination process was concluded in February, 1989. The changes recommended by both the FCC and NTIA (2 documents) were considered by the Interdepartment Radio Advisory Committee (IRAC) on March 28, 1989.

[5] Comments were filed by Aeronautical Radio, Inc. (ARINC), American Institute of Merchant Shipping (AIMS), American Mobile Satellite Corporation (AMSC), Association of American Railroads (AAR), Geostar Positioning Corporation (GPC), Mobile Marine Radio, Inc. (MMR), Radio Technical Commission for Maritime Services (RTCM), Rockwell International Corporation (Rockwell), Tideland Signal Corporation (Tideland), and

United States Coast Guard (USCG). Reply comments were filed by AMSC. A letter of clarification was filed by GPC on July 3, 1989.

[6] We note that no extension of the comment date was requested. Rockwell and RTCM, however, indicated that the short time period afforded minimal opportunity for developing well considered comments. RTCM recommended 120 days for the subsequent proceedings.

[7] As part of the preparation for the 1987 Mobile WARC, a Federal Advisory Committee was established to serve as a focal point for developing U.S. proposals. (*See Notice* at para. 4.) AAR, RTCM, and Tideland note the usefulness of the Federal Advisory Committee in preparation for the 1987 Mobile WARC and recommend its use for future conferences.

[8] ARINC comments at 1.

[9] *See Notice* at paras. 9-11.

[10] The Table of Frequency Allocations (47 C.F.R. § 2.106) contains the international allocations in columns 1-3 and the domestic allocations in columns 4-7.

[11] *See Notice* at para. 18.

[12] AMSC comments at 2-3.

[13] ARINC comments at 3.

[14] AMSC reply comments at 6.

[15] ARINC comments at 8-10.

[16] AMSC reply comments at 9.

[17] Memorandum Opinion and Order, GEN Docket No. 84-1234, FCC 89-181 (released August 4, 1989), 4 FCC Rcd 6016 (1989), at paras. 12-19 regarding the U.S. protocol statement, and paras. 20-29 regarding APC and footnote 729A. This decision has been appealed, *appeal docketed, sub nom. Aeronautical Radio, Inc., and Air Transport Association of America V FCC*, No. 89-1542 (D.C. Cir. September 6, 1989).

[18] Tideland comments at para. 3.

[19] AAR comments at 2.

[20] *See Notice* at para. 12 and GPC comments at 6, footnote 1.

[21] Columns 1-3 are amended as proposed to reflect the international allocations specified in the Radio Regulations, including the L-band revisions. Columns 4-7 are amended as proposed to reflect the domestic revisions due to the 1987 Mobile WARC, excluding the L-band revisions. The present MSS allocation is maintained domestically. *See* Memorandum Opinion and Order, *supra*. In all other cases, the domestic allocations (columns 4-7) reflects the international allocations (columns 1-3).

[22] *See Notice* at para. 13.

[23] GPC comments at 4.

[24] *Id.* at 5. Application File Nos. 407/408/409-DSS-MP/ML-89.

[25] AMSC reply comments at 9-10.

[26] GPC letter dated July 3, 1989.

[27] *See Notice* at para. 20.

[28] The GMDSS will provide a new standard of safety for seafarers worldwide. The GMDSS will replace the present maritime distress and safety system that relies on ship-to-ship distress alerting using manual Morse code. The GMDSS will rely primarily on ship-to-shore distress alerting using satellites and improved HF terrestrial systems employing automated digital communications techniques.

[29] Rockwell comments at 2.

[30] *Id.* at 3.

[31] RTCM comments at 3-4.

[32] USCG comments at para. 3.

[33] MMR comments at 3.

[34] A review of International Radio Consultative Committee (CCIR) Report 585-3 reveals that the reliability of automated transmissions starts to deteriorate rapidly with frequency separations of 35 Hz or more. For example, a ship station using a transmitter with a tolerance of 20 Hz calling a coast station employing a transmitter with a 20 Hz tolerance may be operating with some degradation in performance. If the coast station transmitter called has a frequency tolerance of 10 Hz, however, the possiblity of reliable communications is greatly enhanced.

[35] During the phase-in period for GMDSS between 1992 and 1999, compulsory fitted ship stations using NBDP and DSC techniques that voluntarily implement the GMDSS prior to February 2, 1999, may need to meet the new 10 Hz tolerance. This requirement will be addressed more fully in the subsequent proceeding concerning the GMDSS. *See* Public Notice, *supra*.

[36] *See Notice* at para. 22.

[37] RTCM comments at 5.

[38] USCG comments at para. 4.

[39] *Id.* at para. 6.

[40] *Id.* at para. 7.

[41] *Id.* at para. 8.

[42] *Report and Order* in Docket No. 21255, (released July 26, 1978), 43 Fed. Reg. 32797 (1978), 43 RR 2nd 971 (1978).

[43] *See Notice* at paras. 22 and 23.

[44] New frequencies and requirements for the maritime mobile service operating in the 4-27.5 MHz bands, which are not effective until July 1, 1991, will be addressed in a subsequent proceeding. *See* Public Notice, *supra*.

[45] This amendment is consistent with the practice of referencing CCIR documentation for equipment characteristics in the maritime mobile service. *See* 47 C.F.R. §§ 80.179 and 80.225.

[46] We foresee little difficulty with this approach but caution that we may have to re-evaluate these revisions if consent by the U.S. Senate requires modifications. The benefits gained by implementation in accordance with the international dates, however, outweigh the minor possibility that further changes might be necessary.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 88-274
37459

In the Matter of	)
	)
Kansas City Television, Ltd.,	)
Debtor-in-Possession,	)
	)
Licensee of Television Station	)
KZKC(TV), Kansas City, MO	)
	)
Notice of Apparent Liability	)
adopted June 23, 1988	)

ORDER
(Staying Proceeding)

Adopted: August 5, 1988 Released: August 5, 1988

By the Commission:

1. On June 23, 1988, the Commission voted to issue a Notice of Apparent Liability to Kansas City Television, Ltd., Debtor-in-Possession, licensee of KZKC(TV), Channel 62, Kansas City, Missouri, for its evening hours broadcast of the movie "Private Lessons." The Commission determined that the broadcast, beginning at 8 p.m. on May 26, 1987, violated the prohibition against the broadcast of indecent material, and that the licensee was apparently liable for a forfeiture of $2,000.

2. Before the Notice of Apparent Liability was released, the United States Court of Appeals for the District of Columbia Circuit issued a decision in Action for Children's Television v. FCC, No. 88-1064 (D.C. Cir. July 29, 1988). While affirming the Commission's general approach to enforcing the prohibition against indecent broadcasts and upholding the Commission's decision as to a daytime broadcast, the court vacated two Commission decisions involving evening broadcasts pending further Commission proceedings.

3. In light of this court decision, the Commission has decided to stay the release of the Notice of Apparent Liability against KZKC(TV).

4. ACCORDINGLY, IT IS ORDERED, That release of the above-captioned Notice of Apparent Liability is STAYED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 88-257
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 94	)	PR Docket No. 86-174
of the Commission's Rules	)	RM-5072
to Accommodate Radio Local Area	)	
Network Stations in the	)	
1700-1710 MHz Band	)	

REPORT AND ORDER

Adopted: July 26, 1988 Released: August 12, 1988

By the Commission:

1. On June 14, 1985, Motorola, Inc. (Motorola) petitioned this Commission to amend Parts 2 and 94 of its Rules to permit radio local area networks (RLANs) to share, on a secondary basis, the 1700-1710 MHz frequency band with the Meteorological Satellite Service (MetSat). Motorola's proposal for RLANs would provide wireless connection of personal computers and desktop terminals to central processors thereby allowing the terminals to be relocated without the expense and disruption of rewiring.

2. Upon review of Motorola's petition, we adopted a Notice of Proposed Rulemaking[1] on May 19, 1986, proposing to permit secondary use of the 1700-1710 MHz band for RLANs and for other systems that use similar interconnection techniques.[2] The Notice expressed our overriding concern

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1 Notice of Proposed Rulemaking, PR Docket No. 86-174, 51 Fed. Reg. 19570 (1986) (Notice).

2 The Notice stated that, "The [RLAN] concept could apply to applications that are not solely office-related [e.g.] slow and high speed data, digital voice, facsimile and video." Notice at para. 5.

that the potential for interference be minimized and, therefore, solicited comments on several aspects of the proposal.[3]

3. The Commission has maintained contact with the National Telecommunications and Information Administration (NTIA) throughout this proceeding because the 1700-1710 MHz band is allocated on a primary basis for meteorological satellite and government fixed station use.[4] Although NTIA did not initially object to use of the 1700-1710 MHz band for RLANs, in subsequent comments[5] it provided new information regarding projected use of the band by the primary users.[6] Specifically, the number of ground terminals is expected to be several times larger than originally believed. Extensive use of the band for MetSat purposes makes the possibility of sharing more difficult. Discussions between Motorola and NTIA have resolved some, but not all, of the concerns identified by the operating Federal agencies represented by NTIA.

4. Upon review of the record in this proceeding, we conclude that there are too many complex technical and regulatory issues associated with permitting RLANs in the 1700-1710 MHz band to go forward at this time. Because the number of primary users that could be negatively affected by interference from secondary RLANs appears to be much larger than originally envisioned, the expenditure of limited Commission resources for administration of the proposed secondary licensing plan in the event of interference militates against use of the band primarily allocated to MetSat. We remain convinced, however, that development of the RLANs concept in some form is in the public interest. We welcome, therefore, any further proposals that might prove more promising for an RLAN service.

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3 E.g., Interference criteria, Notice at para. 7; channeling plans, assignment procedures, and equipment tolerances, Notice at para. 8; licensing alternatives, Notice at para. 11; and frequency coordination procedures, Notice at para. 12.

4 The 1700-1710 MHz band is available for non-government fixed use on a secondary basis. See Notice at para. 6.

5 Compare Letter to William R. Torak, FCC, from William D. Gamble, NTIA (dated April 2, 1986) with Comments filed by NTIA on December 19, 1986 and Letter to Dennis R. Patrick, Chairman, FCC from Alfred C. Sikes, Office of the Assistant Secretary for Communications and Information, U.S. Department of Commerce (dated March 11, 1988). (Included in the record of this docket.)

6 In developing its comments, NTIA consulted the Interdepartment Radio Advisory Committee (IRAC), which assists NTIA in authorizing and regulating the Federal government's use of radio frequency spectrum.

5. In view of the above, pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) & 303, IT IS ORDERED that this proceeding IS TERMINATED without further action.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary,
Federal Communications Commission

FCC 88-243
37433

Before the
Federal Communications Commission
Washington, D. C. 20554

In re Request of	)
	)
	)
	)
TWENTIETH HOLDINGS CORPORATION	)
	)
	)
	)
For Extension of a Divestiture Requirement	)

ORDER

Adopted: July 15, 1988 Released: July 18, 1988

By the Commission:

1. Section 73.3555(c) of the Commission's Rules generally prohibits the creation of newspaper/broadcast combinations in the same market. This case involves the request of Twentieth Holdings Corporation (Twentieth) for a temporary extension of a divestiture requirement imposed by the Commission to bring about compliance with that rule.

2. Twentieth is the parent of WFXT, Inc., licensee of station WFXT(TV) channel 25, Boston, Massachusetts. Mr. Rupert Murdoch controls Twentieth, as well as News America Publishing Incorporated (News America), publisher of the Boston Herald. At the time Twentieth sought to acquire control of station WFXT(TV), it requested an 18-month waiver of section 73.3555(c) of the Rules to permit the temporary common control of the Herald and station WFXT(TV). The Commission granted the waiver and the transfer application in Twentieth Holdings Corp., 1 F.C.C. Rcd. 1201 (1986). Under the terms of that decision, Twentieth had until June 30, 1988 to come into compliance with the rule.

3. Subsequent events, however, resulted in a brief extension beyond the date specified by the Commission. Congress enacted Pub. L. No. 100-202, 101 Stat. 1329 (1987), which the President signed on December 22, 1987. One of the provisions of that law directed that the Commission could not spend appropriated funds to extend existing waivers of section 73.3555(c) of the Rules, a restriction that in fact applied only to entities controlled by Mr. Murdoch. On January 14, 1988, News America filed a request for an extension of its divestiture requirement. Among other things, News America contested the

constitutionality of the restriction on the Commission's use of appropriated funds. The Commission, however, concluded that it was obligated to follow Congress' mandate and that the terms of the statute were unambiguous. Accordingly, the Commission dismissed News America's request for an extension of its 18-month waiver of section 73.3555(c). News America Publishing, Inc., 3 F.C.C. Rcd. 564 (1988). News America pursued its constitutional challenge in the United States Court of Appeals for the District of Columbia Circuit, which later issued an Order staying the effectiveness of the June 30, 1988 divestiture requirement "until 45 days after the court's decision in this appeal." News America Publishing, Inc. v. FCC, No. 88-1037 (D.C. Cir. Jan. 25, 1988). The court subsequently found the statute unconstitutional with respect to the expenditure limitation and remanded the proceeding to the Commission. News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988). The court issued its mandate in that case on June 3, 1988, so that its 45-day extension of the divestiture requirement expires on July 18, 1988, under rule 26(a) of the Federal Rules of Appellate Procedure. As a result of the court's action, however, we have the authority to act on Twentieth's request for a temporary extension.

4. Instead of pursuing its January 14 waiver request, Twentieth has elected a new course. It now proposes to transfer control of the license for station WFXT(TV) to two independent trustees, who are instructed to use their best efforts to sell the station to a third party. The Commission accepted the application (BTCCT-880617KE) for filing by Public Notice dated June 24, 1988. Under section 1.4(a)(3) of the Rules, the 30-day waiting period specified by section 309 of the Communications Act and section 73.3584 of the Rules will not expire until July 25, 1988, or seven days after expiration of the court-granted extension. Twentieth therefore requests a "temporary waiver of sufficient duration" for the Commission to evaluate the transfer application.

5. Twentieth has filed an application that it believes will bring it into compliance with the divestiture requirement and the provisions of section 73.3555(c). As noted, the statutory waiting period to afford public comment on Twentieth's application will not expire until seven days after the court-extended divestiture date. In these circumstances, where Twentieth has filed an application it believes will comply with the divestiture requirement, we believe the public interest will be served by the grant of a brief temporary extension of its waiver. A temporary extension will permit the passage of the statutory waiting period, evaluation of Twentieth's application, and consideration of any objections or petitions that may be filed against the application. We intend to complete our review of the application and any associated filings as expeditiously as possible, so that the extension will be no longer than necessary. Such an extension is in

keeping with analogous cases where divestiture was required and where additional time was needed to seek court review or to process applications. See, e.g., Anniston Broadcasting Co., 51 R.R.2d 1300 (1982), and Multiple Ownership, 76 F.C.C.2d 339 (1979), reconsideration denied, 76 F.C.C.2d 344 (1980).

6. Accordingly, IT IS ORDERED, That the request of Twentieth Holdings Corporation for an extension of its waiver of section 73.3555(c) of the Commission's Rules IS GRANTED for a period ending 30 days after Commission action on the pending transfer application (BTCCT-880617KE) becomes final and is no longer subject to review by any court.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 88-244
37434

In the Matter of	)	
	)	
Establishment of a Program to Monitor the Impact of Joint Board Decisions	)	CC Docket No. 87-339

ORDER ON RECONSIDERATION

Adopted: July 18, 1988 ; Released: July 19, 1988

By the Commission:

I. Introduction

1. In an Order released on August 26, 1987, [1] we adopted the recommendations of the Federal-State Joint Board in CC Docket No. 80-286 (CC Docket 80-286 Joint Board) [2] that we establish a program to monitor the impact of the decisions recommended by that Joint Board, and the impact on revenue requirements of certain separations changes recommended by the Federal-State Joint Board in CC Docket No. 86-297 (CC Docket 86-297 Joint Board). [3] This program established a series of monitoring reports to

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1 Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987) (Order).

2 MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, and Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 3298 (1987) (Recommended Decision and Order).

3 Amendment of Part 67 (New Part 36) of the Commission's Rules and

reflect information this Commission collects from industry and other sources in eight categories: (1) subscribership and penetration levels; (2) lifeline assistance plans, including both the subscriber line charge waiver and Link Up America programs; (3) costs and high cost assistance; (4) network usage and growth; (5) rates and revenues; (6) bypass; (7) pooling and rate deaveraging; and (8) jurisdictional shifts in revenue requirements. On October 28, 1987, Pacific Bell and Nevada Bell (Pacific) filed a Petition for Clarification and Reconsideration regarding the information we are collecting in this monitoring program in the categories pertaining to lifeline assistance plans, network usage and growth, bypass, and jurisidictional shifts in revenue requirements. 4 For the reasons discussed below, we deny this petition for reconsideration. We take this opportunity, however, to clarify certain aspects of the monitoring program. Below we discuss each issue individually.

II. Lifeline Assistance Programs

A. Background

2. We have established two federal lifeline assistance plans for low income households in those states that elect to participate. The first plan waives all or part of the federal subscriber line charge to the extent that the state matches the contribution with an equal reduction in the lifeline assistance subscriber's local service charges. 5 The second plan, known

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Establishment of a Federal-State Joint Board, CC Docket No. 86-297, 2 FCC Rcd 2582 (1987) (Conformance Recommended Decision and Order).

4 Pacific Bell and Nevada Bell, Petition for Clarification and Reconsideration, filed October 26, 1987, (Petition). Responsive pleadings were filed by the Ameritech Operating Companies (Ameritech), Southwestern Bell Telephone Company (Southwestern), and the United States Telephone Association (USTA). The New York State Department of Public Service (New York) filed comments in this docket within the time permitted to filed reply comments. Although New York's pleading was not titled as such, we treat it as reply comments because it raises issues related to this proceeding.

5 MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 85-643, 51 Fed. Reg. 1371 (January 13,1986) (Decision and Order).

as Link Up America, establishes a federal contribution to service connection and installation charges for qualifying households and interest subsidies to the local exchange carriers (LECs) that offer plans for deferred payment of those service commencement charges. 6 The Link Up America program does not require matching state contributions, but each lifeline plan must be certified by this Commission. 7

3. In establishing both federal lifeline assistance programs, we required annual reports from the entity receiving certification in order to maintain that certification. 8 The entity could either be a state regulatory agency or a local exchange carrier. These annual reports include a description of the assistance measures, the cost of the program, information on the number of existing subscribers who switch to lifeline service from other services offerings, and the number of new subscribers using the lifeline service. The reports should also include any available information on the effect of the program on subscribership of low-income groups.

B. Positions of Parties

4. Pacific seeks clarification or reconsideration on three matters. First, it seeks clarification of "the cost of the program", i.e. what should be included and what should be excluded from the reported cost. Pacific indicates that such clarification will make this information comparable among companies. Second, Pacific requests that data on the number of lifeline subscribers only be required in cases in which the companies have the data available. It indicates that Pacific does not currently have that data, and can only supply future data when it implements a new procedure now under development. Pacific also suggests that participation figures

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6 MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987) (Report and Order).

7 Recommended Decision and Order, 2 FCC Rcd at 3299.

8 Decision and Order at para. 5; Report and Order, 2 FCC Rcd at 2955.

will be more meaningful if expressed in relative, rather than absolute, terms. Finally, Pacific asks us to eliminate from the reports information regarding the impact of the lifeline assistance program on the subscribership levels among low-income groups. It argues that such data would generally be meaningless since the data would have to be estimated on the basis of demographic information. 9

C. Discussion

5. Certain provisions of the lifeline reporting requirements may be ambiguous. To clarify these provisions, the Common Carrier Bureau is currently developing a reporting form which it will issue shortly. 10 This form must be completed and filed annually by the entity receiving certification. While the details of the reporting requirements will be explained in the form, the following general principles apply to those reports. First, the cost of the program should include all costs specifically identifiable as related solely to the lifeline and Link Up America programs; no allocation of common or joint costs should be included. Information on the number of subscribers participating in the program must be collected for the year covered by the report. Historical data or estimates for previous years should be provided if the data or estimates are available. Finally, we note that the request for information on the impact of the lifeline programs on low-income subscribers is for "any available information" and thus does not mandate special studies. 11

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9 See Petition at 2-3.

10 We have delegated authority to the Chief of the Common Carrier Bureau to prescribe forms and collect information relevant to the monitoring program. Order at n. 11. The information needed for the monitoring program is essentially the same information which we previously required to be reported annually. Two largely duplicative reports will not be necessary. The Chief of the Common Carrier Bureau will prescribe a form for the monitoring program, which will satisfy our requirement that an annual report be submitted from each certified entity for continued eligibility in the lifeline waiver and Link Up America programs.

11 Recommended Decision and Order at para. 13.

III. Network Usage and Growth

A. Background

6. Our Order adopted the Joint Board's recommendation that LECs that compute Carrier Common Line settlements on a cost basis be required "to report by study area, on an annual basis, the total switched minutes of use, and the Subscriber Plant Factor (SPF), Subscriber Line Usage (SLU), and Dial Equipment Minutes (DEM) factors." 12

7. To implement this requirement, on October 26, 1987, the Common Carrier Bureau issued a Network Usage Data Request, which was distributed by the National Exchange Carrier Association (NECA) to the LECs. 13 The requested information was to be submitted in two stages. The first stage was traffic information from Tier I companies for 1985 and 1986. The second stage was for 1985 and 1986 data from other cost companies and for 1980 to 1984 data from all cost companies. Tier I companies have already supplied the requested data for 1985 and 1986.

B. Positions of Parties

8. Pacific interprets the requirement to report "total switched minutes of use" to mean Switched Minutes of Use (SMOU). The petition requests that we eliminate SMOU data. Pacific asserts that while interstate SMOU is available and is reported as "Revenue Producing MOU," comparable intrastate toll and local exchange usage data would be too costly to obtain. 14

9. USTA objects to part of the Network Usage Data Request. Specifically, USTA raises two objections to the collection of data for the period 1980 to 1984. First, USTA argues that the data are not comparable because of the many structural and regulatory changes during this period.

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12 Id. at para. 18.

13 Letter from Gerald Brock, Chief, Common Carrier Bureau (October 26, 1987). This letter was sent to all companies that settle on a cost basis.

14 See Petition at 3-4.

Among these changes, USTA lists the transition from pre-divestiture interstate separations and settlements to the post-divestiture access charge structure, the transition from the former SPF to the 25% interstate allocation, the transitional allocation of interstate customer premises equipment costs, and the inside wire and station connection amortizations. Second, USTA contends that collection of the data would be costly, since it would require retrieval and reconstruction of the data from archives and verification to ensure consistency with previous filings. 15

C. Discussion

10. We clarify that, as indicated in the Network Usage Data Request, we do not intend to seek SMOU data. The Order merely required usage reports which can be satisfied by the provision of the readily available minutes-of-use data associated with the SLU and DEM factors.

11. In response to USTA's concerns about the cost of data collection, we agree that LECs that are not Tier I companies need not file the requested data for the period 1980 to 1984. We do expect to receive these data from the Tier I companies, however. We believe that by requiring these data only from Tier I companies, we will satisfy USTA's concerns about the cost and burden imposed on smaller companies, and we will still be able to determine industry usage trends. We do not regard the various structural and regulatory changes cited by USTA as germane to the measurement of usage, since usage has only been indirectly affected by those changes. We believe that even given these changes, reports of usage for the period 1980 to 1984 will provide useful information for the monitoring process. We will therefore continue to require the submission of these data from Tier I companies.

IV. Bypass

A. Background and Positions of Parties

12. The September 1987 Monitoring Report sought comments on the frequency and format of LEC reports on bypass. In response to that request, Pacific and several other companies have suggested that bypass reports be filed semi-annually, using a proposed format. 16

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15 See Comments of USTA at 3-6.

16 The responses of the various parties to the request for comments are summarized in the December 1987 Monitoring Report, pages 110-112. See also Petition at 5-7 and Attachments A and B.

B. Discussion

13. The Common Carrier Bureau sent a bypass data request on December 24, 1987, to GTE Corporation and the seven regional Bell Operating Companies, 17 that requires the bypass reports to be filed semi-annually, beginning April 29, 1988. The required form is a slightly expanded version of the one recommended by Pacific. We believe that this bypass data request will elicit the data necessary for the Joint Board and the Commission to adequately analyze the extent and impact of any bypass.

V. Jurisdictional Shifts in Revenue Requirements

A. Background

14. On January 1, 1988, a new Uniform Systems of Accounts, 18 a new Separations Manual, 19 and new access charge apportionment procedures 20 became effective. The CC Docket 86-297 Joint Board revised the Separations Manual to conform the separations rules to the new acounting rules and to simplify the separations process. 21 Most of the recommended separations

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17 Letter from Gerald Brock, Chief, Common Carrier Bureau (December 24, 1987).

18 Uniform System of Accounts, 51 Fed. Reg. 43,498 (December 2, 1986) (to be codified at 47 C.F.R. Part 32). Part 32 replaced Part 31 on January 1, 1988.

19 Separations Manual, 52 Fed. Reg. 17,228 (May 6, 1987) (to be codified at 47 C.F.R. Part 36). Part 36 replaced Part 67 on January 1, 1988.

20 Access Charge Rules, 52 Fed. Reg. 37,368 (October 6, 1987).

21 Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket Nos.78-72, 80-286, and 86-297, 2 FCC Rcd 2639 (1987), petitions for recon. filed,

changes were designed to satisfy the objectives of conformance and simplification with minimal impacts on revenue requirements. 22 The CC Docket 86-297 Joint Board recommended that we monitor the effects of its recommendations in connection with the monitoring program established in CC Docket No. 80-286. 23 Subsequently, this Commission adopted 24 a Joint Board recommendation 25 to request the LECs to report annually for two years any jurisdictional shift in total revenue requirements that is five percent or more of the annual total revenue requirement for the study area. The Joint Board stated that this reported shift should exclude any revenue requirement shift resulting from the implementation of separations changes that were adopted in the CC Docket No. 80-286 proceeding, including changes in COE and the Revenue Accounting Expense allocations. It proposed the exclusion because it expected those changes to have a substantial impact on revenue requirements. The Joint Board recommended this monitoring program to identify the revenue requirement impact resulting from the conformance of the separations rules to the new accounting rules and from simplification of the separations rules.

15. The CC Docket 80-286 Joint Board stated that LECs filing in response to the Order should calculate the jurisdictional shift in revenue requirements for calendar years 1988 and 1989 and should report such shifts to this Commission at the beginning of March 1989 and March 1990 for inclusion in the June monitoring reports of those years. That Joint Board clarified that LECs with jurisdictional shifts of less than five percent need not file a report. That Joint Board believed that the annual filing of data, identifying shifts in total revenue requirements due

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June 8, 1987.

22 Some changes recommended by the CC Docket 80-286 Joint Board, such as the new allocation factor for Category 3 Central Office Equipment (COE), are expected to affect revenue requirements.

23 Conformance Recommended Decision and Order, 2 FCC Rcd at 2582, 2586.

24 Order, see supra note 1.

25 Recommended Decision and Order, 2 FCC Rcd at 3302.

to the conformance and simplification of separations procedures, will be sufficient to identify any unintended effects of the new separations procedures.

B. Positions of Parties

16. Several parties address the issue of the method and scope of the LECs' reporting of jurisdictional shifts in revenue requirements. Pacific asks us to clarify or modify that report to permit LECs to provide simulated impacts of the new separations procedures on revenue requirements. Pacific proposes to use modeling techniques to simulate actual revenue requirement impacts, rather than report actual impacts.

17. Pacific contends that LECs would have to maintain costly dual accounting and separations systems for the sole purpose of providing this information. Specifically, Pacific argues that if the LECs attempt to report actual impacts, they would have to retain (for both 1988 and 1989) the former Part 31 accounting procedures, the former Part 67 separations procedures, and the former access charge mechanized allocation system. It says LECs would have to continue to perform complex separations studies, which would no longer be necessary after 1987, in order to report actual data. Pacific also notes that the LECs would have to maintain additional procedures to eliminate the effects of other separations changes recommended by the CC Docket 80-286 Joint Board. 26

18. Several parties filed responsive pleadings. USTA supports Pacific petition. 27 Ameritech and Southwestern disagree with Pacific's interpretation of the decisions regarding the reporting requirements for jurisdictional shifts, contending that the decisions of the two Joint Boards and this Commission do not require the use of dual accounting and separations procedures and do not prohibit the use of modeling techniques to calculate revenue requirement shifts. 28 Ameritech and Southwestern agree, however, that this Commission should clarify the information it seeks.

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26 See Petition at 7-9.

27 See Comments of USTA at 1-3.

28 See Comments of Ameritech at 2-4; Comments of Southwestern at 1-2, 8.

19. Ameritech states that the use of the word "calculated" in the Recommended Decision and Order suggests that the only actual data that LECs must analyze are those based on the new accounting and separations rules, not based on the former procedures. Ameritech asserts that the use of modeling techniques to calculate revenue requirement shifts would be fully consistent with the Joint Board's decision. Moreover, Ameritech states that if this Commission construed the monitoring plan as requiring the use of Part 31 accounting after the effective date of the replacement Part 32, that decision would violate Section 220(g) of the Communications Act, which mandates that carriers maintain one set of prescribed accounts. 29

20. Ameritech and Southwestern contend that this Commission demonstrated that it did not contemplate dual accounting and separations procedures for reporting jurisdictional shifts when it submitted the monitoring plan for approval by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act. 30 Those carriers observe that the approval request advised OMB that the reporting of revenue requirement shifts would require a special study that would require approximately 120 hours to complete for each of the fifteen companies expected to report, for a total of 1,800 hours for the industry.

21. Ameritech and Southwestern argue that the estimate this Commission supplied to OMB clearly shows that this Commission never intended to rely on dual accounting and separations systems. First, those carriers assert that if LECs report actual impacts, no special study would be required. Second, those carriers submit that maintenance of dual accounting and separations procedures would require much more than 120 hours to implement per company. Moreover, Ameritech asserts that OMB would not have approved the monitoring plan if it had believed that we intended to rely on the costly burden of maintaining dual accounting and separations systems.

22. Ameritech and Southwestern also assert that maintenance of a dual set of accounting procedures would be unnecessarily burdensome and costly for the LECs and their customers. 31 Southwestern further asserts that even if it retained both Part 31 and Part 32 accounting records,

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29 47 U.S.C. § 220(g).

30 44 U.S.C. § 3505.

31 See Comments of Ameritech at 6-8; Comments of Southwestern at 4-6.

actual separated Part 31 data could not be meaningfully compared to actual separated Part 32 data, because the actual Part 32 separated amounts would reflect many accounting and separations changes that the Joint Board and the Commission expressly stated should be excluded from the reported data. Therefore, Southwestern concludes, any meaningful analysis of jurisdictional shifts in revenue requirements must be predicated on a computer modeling of the correlations between the former rules and the new rules as applied to actual current accounting records.

23. Finally, Ameritech and Southwestern contend that the costs associated with the maintenance of dual accounting and separations procedures would be greatly reduced by allowing carriers to report simulated impacts developed through a modeling technique. Ameritech urges us to adopt the model developed by USTA as a guide for determining jurisdictional revenue requirement shifts. Southwestern proposes an approach using updates of the jurisdictional revenue requirement shift estimates that the LECs provided to the Joint Board in CC Docket No. 86-297, which were based on a modeling approach. 32

24. New York states that neither the Joint Board nor this Commission has presented an analysis of the cumulative nationwide effect of all the separations revisions that have resulted from the recent separations decisions. New York is concerned that no clear overall picture exists of the impact of the recent separations changes adopted by the Joint Boards in CC Docket Nos. 80-286 and 86-297. New York believes that the monitoring proceeding would be the ideal vehicle to develop such an analysis because the cumulative effects of all separations changes are directly related to the issues subject to monitoring over the next five years. Therefore, New York suggests that the monitoring program be amended to include consideration of the jurisdictional revenue requirement impact of the recent changes recommended by the CC Docket 80-286 Joint Board and of depreciation reserve deficiencies. New York presents a proposal for the calculation of these cumulative separations effects. 33

25. New York contends that neither the Joint Board nor this Commission has addressed the revenue requirement impact resulting from changes in the allocation of depreciation reserve deficiencies. New York maintains that the recent changes in jurisdictional allocation factors for plant investment could shift substantial reserve deficiencies from the interstate

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32 For a description of Southwestern's proposal, see its comments at 7-8.

33 See Comments of New York at 4.

jurisdiction to the state jurisdiction. New York also contends that although some states require the amortization of reserve deficiencies over a specified period of time, those reserve deficiencies may not be fully amortized as scheduled, in light of the revenue requirement shift to the state jurisdiction that may result from recent separations changes. New York expresses concern that any additional costs incurred by the state jurisdiction and any additional revenue requirement shifted to the state jurisdiction be fully recognized and quantified. It therefore requests that the monitoring program be amended to include such information.

C. Discussion

26. Our preferred method for reporting jurisdictional shifts in revenue requirements requires clarification. We disagree with Pacific's interpretation of the Joint Board recommendations and Commission decisions and instead agree with the interpretation of Ameritech and Southwestern. The Joint Board and this Commission did not intend to request that LECs report actual, rather than modeled, data in reporting jurisdictional shifts in revenue requirements. We intended to allow carriers to use modeling as a technique to calculate the revenue requirement impact of the new Separations Manual. Southwestern and Ameritech also are correct in asserting that our estimate of the burden hours required to comply with the reporting requirement was predicated on the LECs' use of a modeling approach. Moreover, we did not intend to impose the costly and complex burden of maintaining dual accounting and separations systems on the LECs, especially in light of our goal of reducing such burdens by simplifying the separations process. Contrary to those goals, the maintenance of dual systems would require the LECs to perform certain complex and costly studies which we eliminated as part of our simplification of the Separations Manual. We accordingly clarify that in complying with our request for reports on jurisdictional shifts in revenue requirements, LECs may report data using a modeling approach rather than report actual data.

27. Several modeling approaches have been proposed by the industry to determine jurisdictional shifts in revenue requirements. We believe, however, that the use of one approach by the entire industry is necessary for a meaningful and accurate analysis of the results. We therefore intend to establish a modeling technique that will be used by all carriers in reporting jurisdictional shifts in revenue requirements. We hereby solicit suggestions, to be filed in the open docket in this proceeding, of approaches to the modeling of revenue requirement impacts. Any such proposals should be as specific as possible, with appropriate illustrative examples. We specifically request that USTA, Pacific, Ameritech, and Southwestern submit their suggested techniques. Comments suggesting modeling approaches should be filed not later than 42 days from the release date of this order and reply comments 21 days thereafter.

28. We decline to expand the monitoring plan as suggested by New York. New York suggests that we include an assessment of the impact of the jurisdictional separations changes adopted by the Joint Board in CC Docket No. 80-286 in our evaluation of the revenue requirement impacts of the separations conformance proceeding. We assume that New York is referring to the impact of changes in addition to those impacts already subject to the monitoring program. The CC Docket 80-286 Joint Board discussed in detail those revenue requirement impacts. 34 The impact of those changes was fully evaluated by that Joint Board and was thoroughly considered by this Commission in adopting the Joint Board recommendations. We do not believe further review of these impacts is necessary. Moreover, the Joint Board recommended, and this Commission adopted, certain measures to prevent adverse revenue requirement impacts, including a transition to new separations procedures for Category 3 COE and a weighting of the Category 3 COE allocation factor for small carriers. Thus, the issue of the revenue requirement impacts of those jurisdictional separations changes was fully considered and adequately addressed in that proceeding and need not be revisited.

29. Neither Joint Board, nor this Commission, intended the monitoring program to be a comprehensive, all-encompassing review of the impact of every recent separations decision. Both Joint Boards and this Commission instead intended the program to be a review of certain specific changes in this Commission's rules that the Joint Board estimated would have certain expected impacts. The request for reports of jurisdictional shifts in revenue requirements was intended to confirm that the impact of separations conformance to accounting changes and of separations simplification would be as the Joint Board and this Commission expected. The remainder of the program was intended to monitor the effect of certain changes in subscriber line charges, the federal lifeline assistance programs, the high cost assistance formula, and the common line pooling system. 35 Expansion of the monitoring program as suggested by New York would not further the goals of this proceeding and would exceed the purposes of both Joint Boards and of this Commission in establishing the program.

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34 See, e.g., Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 2551, 2556-57 (1987) (Central Office Equipment).

35 See Recommended Decision and Order, 2 FCC Rcd at 3298.

30. Similarly, expansion of the monitoring program to include a review of the revenue requirement impacts of changes in depreciation reserve deficiencies would exceed the purposes of the monitoring program. Moreover, the question of the allocation of depreciation reserve deficiencies was not referred to any Joint Board and has never been considered by any Joint Board. Accordingly, this subject will not be included in the monitoring program.

VI. Ordering Clause

31. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 U.S.C.§§ 154 (i) and (j), 201, 202, 203, 403, and 410 and 5 U.S.C. § 553, the Petition for Clarification and Reconsideration filed by Pacific Bell and Nevada Bell IS GRANTED to the extent provided herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 88-1
.373

In re Applications of:	)	
	)	
Channel 33, Inc.	)	BRCT-860929KI
	)	
For Renewal of License of Station WBFS-TV, Channel 33, Miami, Florida	)	
	)	
	)	
Orbis Television Stations, Limited Partnership	)	BPCT-870102KE
	)	
For a Construction Permit for a New Commercial Television Station on Channel 33, Miami, Florida	)	
	)	
	)	
Grant Broadcasting System, Inc., Debtor-In-Possession (Transferor)	)	
	)	
and	)	BTCCT-871110KR
	)	
Grant Broadcasting Systems, Inc., a Delaware Corporation (Reorganized) (Transferee)	)	
	)	
For Transfer of Control of Channel 33, Inc., licensee of Station WBFS-TV, Channel 33, Miami, Florida	)	
	)	
	)	
	)	
Grant Broadcasting of Philadelphia, Inc., Debtor-In-Possession (Assignor)	)	
	)	
and	)	BALCT-871110KS
	)	
Grant Broadcasting of Philadelphia, Inc., a Delaware Corporation (Reorganized) (Assignee)	)	
	)	
For Assignment of License of Station WGBS-TV, Channel 57, Philadelphia, Pennsylvania	)	

Grant Subsidiary of Chicago, Inc., Debtor-In-Possession	)	BRCT-870803KO
For Renewal of License of Station WGBO-TV, Channel 66, Joliet, Illinois	)	
Joliet Television Station, Limited Partnership	)	BPCT-871102KE
For a Construction Permit for New Commercial Television Station on Channel 66, Joliet, Illinois	)	
Grant Subsidiary of Chicago, Inc., Debtor-In-Possession (Assignor)	)	
and	)	BALCT-871110KT
Grant Subsidiary of Chicago, Inc., a Delaware Corporation (Reorganized) (Assignee)	)	
For Assignment of License of Station WGBO-TV, Channel 66, Joliet, Illinois	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1988 Released: June 15, 1988

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for: (a) transfer of control or assignment of licenses of television stations WBFS-TV, Miami, Florida; WGBS-TV, Philadelphia, Pennsylvania; and WGBO-TV, Joliet, Illinois, from Grant Broadcasting Systems, Inc. and its subsidiaries (Grant) to Grant Broadcasting Systems, Inc., reorganized and reincorporated (Creditors); (b) renewal of licenses for stations WBFS-TV and WGBO-TV; (c) construction permits, filed by Orbis Television Station, Limited Partnership and Joliet Television Station, Limited Partnership, for new commercial television stations to operate on channels currently used by stations WBFS-TV and WGBO-TV; (d) related pleadings; and (e) a settlement agreement among the parties.

2. On May 17, 1988, the applicants for construction permits for new commercial television stations requested that their applications and related pleadings be dismissed pursuant to a settlement agreement. [1] Thus, all that remains for consideration are the transfer/assignment applications and the renewal applications. We have reviewed the renewal applications and find that their grant will serve the public interest. Normally, we do not grant renewal applications to a temporary licensee under court supervision, such as here, where the licensee is a debtor-in-possession. See Channel 64 Joint Venture, Debtor-in-Possession, 3 FCC Rcd 900 (1988). In this case, however, to remove any administrative hurdle and to aid in the prompt assignment/transfer of the subject stations to Creditors that hopefully will return the stations to a profitable position, grant of the renewal applications is appropriate. However, these grants will be made subject to the condition that the applications will return to pending status if the assignment/transfer transactions are not consummated. Thus, we turn to the applications which either assign or transfer control of the subject stations to Creditors.

Background

3. These assignment/transfer applications are necessitated by a $420 million debt that Grant and its subsidiaries are unable to pay. Grant filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania on December 8 and 10, 1986. The subject applications are being filed to faciliate the Joint Plan of Reorganization filed with the court. Under this plan, which the court approved on May 12, 1988, control of the subject stations will pass to certain creditors, which include primarily existing noteholders and companies with which Grant has outstanding contractual obligations for programming, and the debt would be paid in full to these creditors out of the operations of the stations by December 31, 1995. Common stock in the new structure will be divided into two classes, each of which will have equal voting rights. The noteholder creditors will receive one million shares of Class A common stock representing 50 percent of the voting rights and the programmer creditors will receive one million shares of Class B common stock representing the remaining 50 percent voting rights. While no officers have yet to be appointed, six directors have been selected (a seventh director may be selected by the six directors). The six

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1 The settlement agreement has been reviewed and it is consistent with the requirements of Section 311(a)(3) of the Communications Act. Therefore, it will be approved. In addition, we have fully reviewed the matters set forth in the related pleadings. They do not raise any questions concerning the qualifications of the parties to the proposed assignment/transfer proceeding. Those pleadings, therefore, will be dismissed.

directors are Lawrence P. Fraiberg, Charles W. Fries, Barry Thurston, William Jack Anderson, Thomas E. Ireland and Gordon Stulberg. Those creditors that will have attributable stock interests are Executive Life Insurance Co. (18.5%), Magten Asset Management Corporation (8.2%), MCA Inc. (10%), and Lorimar Telepictures Corporation (5.1%).

4. With one exception, the corporate restructuring and the participation of the six individuals as directors are consistent with the Commission's multiple-ownership policies and requirements. The exception involves MCA, Inc. and WGBS-TV, Philadelphia. MCA, Inc., of which Lawrence P. Fraiberg is Vice President, controls WWOR-TV, Inc., licensee of television station WWOR-TV, Channel 9, Secaucus, New Jersey, the Grade B contour of which overlaps that of WGBS-TV in Philadelphia. Section 73.3555(a)(3) of the Commission's Rules prohibits attributable interests in two television stations with overlapping Grade contours.

5. Waiver of the rule is requested to permit MCA Inc. to acquire a 10 percent interest in the reorganized and reincorporated Grant Broadcasting Systems, Inc. In support of this request, Creditors state that the Commission has found waiver of the rule consistent with the public interest where the overlap area is minor and the affected areas enjoy a plethora of competing television services, citing, e.g., Silver King Broadcasting of Vineland, Inc., 2 FCC Rcd 324 (1986); Storer Communications, Inc., 59 RR2d 611 (1986); and Capital Cities Communications, Inc., 59 RR2d 451, 463-64 (1986). Unlike the cited cases, the immediate waiver request arises out of a necessary reorganization of an incumbent licensee under the federal bankruptcy laws to ensure the ongoing viable operations of financially troubled television stations. The subject waiver request also differs from the cited cases because the prohibited overlap is caused not by common control of stations with overlapping Grade B contours, but by the existence of a proposed 10 percent ownership interest by one of numerous creditors of the bankrupt licensee.

6. In any event, the Creditors state that the overlap area (1,698 square miles) constitutes 24.46 percent of the area within the Grade B contour of the Philadelphia station and 23.15 percent of the area within the Grade B contour of the Secaucus station. They assert that the population located within the overlap area (1,064,491) is small and represents 15.76 percent of the population within the Grade B contour of the Philadelphia station and 6 percent of the population within the Grade B contour of the Secaucus station. Together, only 4.34 percent of the residents of the combined Grade B contours live in the overlap area. This, they submit, is smaller than the overlap area and population in Capital Cities Communications, Inc., above, which constituted 24.7 percent of the population within the Philadelphia station's Grade B contour and 12.4 percent of the population within the Grade B contour of the New York station. Id. at 461.

7. Further, Creditors contend that the stations in question serve separate markets. Station WWOR-TV is licensed to Secaucus, New Jersey. Secaucus is part of the greater New York metropolitan area, and the station's viewers reside primarily in northern New Jersey, New York and southwestern Connecticut. The station is part of the New York area of dominant influence (ADI), as defined by Arbitron, which ranks it as the largest television market in the United States. In contrast, WGBS-TV is licensed to Philadelphia, and its viewers reside primarily in the Philadelphia area, northern Delaware and southern New Jersey. The Philadelphia ADI is the fourth largest television market as ranked by Arbitron. Thus, Creditors conclude that the two stations operate in entirely separate markets, "each with particularly individual service needs and responsibilities which are met by each station's local programming," citing Capital Cities Communications, Inc., above, at 465.

8. In addition, Creditors state that no undue concentration of the media would result from waiver of the rule because of the large number of alternative television services available. Creditors claim that 14 other television stations serve the entire overlap area, with an additional 5 to 6 stations serving at least 50 percent of that area. This, they assert, does not take into account the plethora of other broadcast and nonbroadcast media available in the overlap area.

9. Furthermore, Creditors emphasize that MCA, Inc. is not acquiring its minority interest in the three UHF stations as a result of a purchase, but rather by virtue of a bankruptcy proceeding which will convert debt owed to MCA, Inc. for programming into capital stock. Creditors contend that the situation presented here is therefore more compelling than that in Silver King Broadcasting of Vineland, Inc., above, where the Commission granted waiver of the duopoly rule after observing that such action might offer the only opportunity for the station to enhance its economic viability and ability to compete effectively in a very competitive market. Id. at 325. Waiver is necessary here, they contend, to effectuate a financial plan under federal bankruptcy laws. This plan, they argue, would afford the opportunity for the station to become viable and competitive in Philadelphia, and, at the same time, would protect MCA, Inc.'s rights as an innocent creditor. This, it is argued, is consistent both with the Commission's obligation to consider the policies underlying the federal bankruptcy laws, citing LaRose v. F.C.C., 494 F.2d 1145 (D.C. Cir. 1974), and with the Commission's interest in preserving service to the public.

10. Indeed, Creditors contend that the proposed reorganization plan will provide extraordinary benefits that could prove uniquely important to the continued operation of the bankrupt stations. Among these benefits is an agreement by Creditors to continue to make available to the stations the highly desirable programming for which Grant had contracted but could not pay. Absent this agreement, Creditors maintain, "it would have been impossible for these three UHF stations to operate vigorously since quality

programming would not otherwise have been available." Creditors also assert that the generally depressed state of the UHF television market and the enormity of the debt carried by the subject stations make it highly questionable that independent buyers of the bankrupt facilities could have been found. Even if such purchasers could have been located, it is argued, the stations would have faced costly and protracted litigation that, in turn, would have produced substantial operating uncertainty and threatened continued service to the public. In sum, Creditors contend that "implementation of the Plan of Reorganization . . . offers the best and likely the only practical means of assuring the immediate and long-term viability of the three UHF stations."

11. Lastly, the Creditors state that the situation presented is quite different from those noted above because the waiver request does not involve 100 percent common ownership of two television stations with overlapping contours. Here, MCA Inc. is only one of four shareholders having a 5 percent or greater interest. Thus, they contend that MCA Inc. will not be in a position of control.

DISCUSSION

12. For the reasons that follow, we believe that waiver of Section 73.3555(a)(3) of our rules and grant of the assignment application involving station WGBS-TV, Philadelphia, Pennsylvania, will serve the public interest in the unique circumstances presented in this case. First, although MCA Inc.'s interest is, on its face, attributable, it is not a controlling one. Second, the court has stated that the Commission, in making its own public interest determinations, should accommodate other federal policies, to the extent possible. See LaRose v. F.C.C., above, at 1146-47 n.2 We have previously given weight to the findings of a bankruptcy court in dealing with aspects of our multiple ownership rule. See Telemundo, Inc. v. F.C.C., 803 F.2d 513 (D.C. Cir. 1986); Channel 64 Joint Venture, Debtor-in-Possession, above. Finally, we are persuaded that the proposed reorganization plan may well represent the only means by which the subject stations can continue to provide service to the public.

13. In the case before us, the Bankruptcy Court has reviewed and approved a plan that, among other things, proposes giving control of the television stations, including WGBS-TV, to Creditors so as to serve the goals underlying the bankruptcy laws generally, and the innocent creditors of Grant specifically. Thus, grant of these applications will accommodate another federal policy. Moreover, the very large size of the debt ($420 million), the number of creditors involved, and the exceptional nature of the accommodations uniquely afforded the stations by its creditors under the proposed reorganization plan, convince us of Creditors' contention that the pending transfer and assignment transactions likely offer the only workable means of ensuring the continued viability of the bankrupt stations. We believe, in the context of this case, that it makes little sense to insist

on strict compliance of the duopoly provision of our multiple ownership rule to assure maximum diversity of programming viewpoints, if the result of that insistence could be to force these stations off the air, thereby diminishing diversity by a loss of the stations' programming. Thus, we conclude that, based on the circumstances of this case, waiver of Section 73.3555(a)(3) of the Commission's Rules will serve the public interest. However, because the waiver is premised largely on accommodating policies underlying the bankruptcy laws and the protection of innocent creditors, and because MCA Inc.'s 10 percent interest reflects its position as a creditor, we will not allow MCA Inc. to increase its ownership interest in the reorganized licensee of WGBS-TV or to place a second director on the board without prior Commission approval.

CONCLUSION

14. We find that the applicants are fully qualified and that grant of the waiver request, the applications assigning the licenses of WGBS-TV and WGBO-TV, the application transferring control of station WBFS-TV, and the applications for renewal of licenses of stations WBFS-TV and WGBO-TV will serve the public interest, convenience and necessity.

15. Accordingly, IT IS ORDERED, That the settlement agreement filed on May 17, 1988, IS APPROVED, and the applications for construction permits for new television stations filed by Orbis Television Station, Limited Partnership, and Joliet Television Station, Limited Partnership, ARE DISMISSED, along with the related pleadings.

16. IT IS FURTHER ORDERED, That the application (BRCT-860929KI) of Channel 33, Inc. for renewal of license of Station WBFS-TV, Miami, Florida, IS GRANTED, subject to the condition that the application will revert to pending status if the proposed transfer of control to Grant Broadcasting Systems, Inc., a Delaware Corporation (Reorganized), is not consummated.

17. IT IS FURTHER ORDERED, That the application (BRCT-870803KO) of Grant Subsidiary of Chicago, Inc., Debtor-In-Possession, for renewal of license of Station WGBO-TV, Joliet Illinois, IS GRANTED, subject to the condition that the application will revert to pending status if the proposed assignment of license to Grant Subsidiary of Chicago, Inc., a Delaware Corporation (Reorganized), is not consummated.

18. IT IS FURTHER ORDERED, That the application (BTCCT-871110KR) transferring control of Channel 33, Inc., licensee of Station WBFS-TV, Miami, Florida, from Grant Broadcasting Systems, In., Debtor-In-Possesion, to Grant Broadcasting Systems, Inc., a Delaware Corporation (Reorganized), IS GRANTED.

19. IT IS FURTHER ORDERED, That the application (BALCT-871110KS) assigning the license of Station WGBS-TV, Philadelphia, Pennsylvania, from Grant Broadcasting of Philadelphia, Inc., Debtor-In-Possession, to Grant Broadcasting of Philadelphia, Inc., a Delaware Corporation (Reorganized) IS GRANTED.

20. IT IS FURTHER ORDERED, That the application (BALCT-871110KT) assigning the license of Station WGBO-TV, Joliet, Illinois, from Grant Subsidiary of Chicago, Inc., Debtor-In-Possession, to Grant Subsidiary of Chicago, Inc., a Delaware Corporation (Reorganized), IS GRANTED.

21. The Mass Media Bureau shall send copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FCC 88-186
37393

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Draft International Telecommunication	)	CC Docket No. 88-55
Regulations to be considered by the	)	
World Administrative Telegraph and	)	
Telephone Conference (WATTC-88)	)	

REPORT AND ORDER

Adopted: May 20, 1988 Released: May 24, 1988

By the Commission:

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APPENDIX A - List of Commenting Parties

I. INTRODUCTION

1. The International Telecommunication Union (ITU), founded in 1865 as the International Telegraph Union, is the world's oldest international, intergovernmental organization. The ITU Convention,[1] as the basic instrument of the ITU addresses, inter alia, the composition,[2] purposes[3] and structure[4] of the ITU.

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1 On November 6, 1982, the Plenipotentiary Conference of the ITU at Nairobi, Kenya (the Nairobi Conference), adopted amendments to the ITU Convention that became effective on January 1, 1984. Article 6 of the Convention states that a Plenipotentiary Conference shall normally be convened every five years and, in any case, the interval between successive Plenipotentiary Conferences shall not exceed six years. Chapter IV of the Convention addresses the relationship between the United Nations and the ITU. The ITU became "recognized" at the 1947 Atlantic City Conference as the United Nations specialized agency responsible for international telecommunications matters. See International Telecommunication Union Convention (Nairobi, 1982). (hereinafter ITU Convention).

2 Article 1 of the ITU Convention provides that the composition of the ITU is based on the principle of universality. Specifically, Article 1 states that the membership of the ITU comprises:

a) any country listed in Annex 1 which signs and ratifies, or accedes to, the Convention;

b) any country not listed in Annex 1, which becomes a Member of the United Nations and which accedes to the Convention in accordance with Article 46 [Accession to the Convention];

c) any sovereign country, not listed in Annex 1 and not a Member of the United Nations, which applies for Membership of the Union and which, after having secured approval of such application by two-thirds of the Members of the Union, accedes to the Convention in accordance with Article 46.

The United States is currently one of 164 Member countries in the ITU.

3 Article 4 sets forth efficiency, equity and comity goals of the ITU. Specifically, Article 4 states that the purposes of the ITU are:

2. Article 42 of the ITU Convention states that the provisions of the Convention are supplemented by the Administrative Regulations that regulate the use of telecommunication and shall be binding on all Members.[5] The current Telegraph Regulations and Telephone Regulations were produced by the World Administrative Telegraph and Telephone Conference (WATTC) that was held in Geneva, Switzerland in 1973.[6] Resolution No. 10 of the 1982 Nairobi Conference noted that the current Telephone Regulations deal only with international telephone service, and the current Telegraph Regulations deal mainly with international telegram service. Resolution No. 10 also stated that as a result of the recent development of technology, new telecommunications services have been and will continue to be introduced, and that it would be advisable "to establish, to the extent

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(a) to maintain and extend international cooperation between all Members of the Union for the improvement and rational use of telecommunications of all kinds, as well as to promote and to offer technical assistance to developing countries in the field of telecommunications;

(b) to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunications services, increasing their usefulness and making them, so far as possible, generally available to the public; and

(c) to harmonize the actions of nations in the attainment of those ends.

4 Article 5 details the structure of the ITU, which includes, inter alia, an International Telegraph and Telephone Consultative Committee (CCITT). See Article 5 (d). Article 16 provides that the official languages of the ITU are Arabic, Chinese, English, French, Russian and Spanish. Article 16 also provides that in the case of dispute, the French text shall prevail. As a result, it is common ITU practice to refer to this Committee by the French acronym CCITT (for "Comite Consultatif International Telegraphique et Telephonique").

5 See Article 42. See also Articles 43-50 and Article 83.

6 See Final Acts of the World Administrative Telegraph and Telephone Conference (Geneva, 1973).

necessary, a broad international regulatory framework for all existing and foreseen new telecommunications services." Resolution No. 10 resolved that a WATTC would be convened immediately after the CCITT Plenary Assembly in 1988 to consider proposals "for a new regulatory framework to cater for the new situation in the field of telecommunications services."[7] In addition, Resolution No. 10 instructed the CCITT to prepare proposals for this purpose and to submit the proposals to the CCITT Plenary Assembly for subsequent consideration by WATTC-88.[8] At the invitation of the Australian Government, the IXth CCITT Plenary Assembly will be held in Melbourne, Australia, during the period November 14 through November 25, 1988. WATTC-88 will be held at the same site during the period November 28 through December 9, 1988.

3. The Preparatory Committee for WATTC-88 (PC/WATTC) held four meetings from 1985 to 1987 to prepare the draft International Telecommunications Regulations addressed in Resolution No. 10.[9] The U.S. preparatory activities for PC/WATTC were under the auspices of the U.S./CCITT National Committee[10] and its Study Group B. Study Group B, co-chaired by the Commission's Assistant Common Carrier Bureau Chief-International and the Director for Telecommunications Policies of the

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7 Article 58 provides that the ITU International Consultative Committees shall work through the medium of a Plenary Assembly that preferably meets every four years. Article 58 further provides that when a corresponding world administrative conference has been convened, the Plenary Assembly should meet, if possible, at least eight months before this conference.

8 Resolution No. 10 instructed the Administrative Council to establish the agenda and to make preparations for the convening of WATTC-88. Resolution No. 1 of the 1982 Nairobi Conference, which lists a detailed schedule of future conferences of the ITU, provided for a two-week World Administrative Telegraph and Telephone Conference in 1988 (known as WATTC-88).

9 PC/WATTC was organized in 1984 pursuant to Resolution No. 15 of the VIIIth Plenary Assembly of the CCITT (Malaga-Torremolinos, 1984).

10 The U.S. Organization for the CCITT is chartered under the provision of the Federal Advisory Committee Act (Public Law 92-463), 22 U.S.C. 2656 (1977).

Control Data Corporation, prepared U.S. written contributions for the meetings of the PC/WATTC.[11] The U.S. contributions to the PC/WATTC meetings stressed the following points: (1) the need for flexibility in the International Telecommunications Regulations; (2) the desirability of accommodating changes in international public telecommunications services without the need for frequent changes to the International Telecommunications Regulations; (3) the desirability of minimizing the inclusion of special provisions in the International Telecommunications Regulations; and (4) the desirability of facilitating the adoption of any modified, revised, or amended International Telecommunications Regulations by Member countries.[12]

4. The Final Report on all the activities of the PC/WATTC[13] was published and released by the CCITT Secretariat in November, 1987.[14] The

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11 In 1986, at the recommendation of the Co-Chairmen of Study Group B, the Commission established an informal public file for WATTC materials. The Public File entitled "Comments Regarding a U.S. Position for the Revision of the International Telegraph and Telephone Regulations of the International Telecommunications Union" was announced by Public Notice (Report No. I-5083) dated July 25, 1986. The Public Notice outlined the work of Study Group B and of the PC/WATTC up to that point. The File, which resides in the Common Carrier Bureau International Public Reference Room, Room 533, 1919 M Street, N.W., Washington, D.C. 20554, contains the following: (1) PC/WATTC background materials; (2) Reports on PC/WATTC meetings; (3) minutes of Study Group B meetings; (4) U.S. contributions to PC/WATTC; and (5) public comments and related materials.

12 The U.S. position was based on the following objectives developed by Study Group B: (1) to encourage the continued development of the international network; (2) to promote the technological development and efficient utilization of international telecommunications; (3) to further the introduction of competition in the international telecommunications marketplace; (4) to create an environment that reduces regulation of international telecommunications services and service providers by member governments and administrations; (5) to encourage the efforts of governments or administrations to reduce restrictions on services available to end users; and (6) to accommodate the existence of varying national regulatory regimes.

13 See "Report of the Meeting Held in Geneva from 27 April to 1 May 1987," CP/TT-R4 (PC/WATTC Report R4) (May 1987) (hereinafter PC/WATTC Fourth Report).

Final Report, which is contained in Annex 1, outlines the reasoning behind these new International Telecommunications Regulations and summarizes the main problems considered by the PC/WATTC and certain CCITT Study Groups. Appendix 1 to the Annex contains the draft International Telecommunications Regulations[15] as approved by the PC and put into final form by its Chairman in collaboration with the CCITT Secretariat.[16]

II. NOTICE OF INQUIRY

5. On February 2, 1988, this Commission adopted a Notice of Inquiry in order to provide an opportunity for public comment on the proposed draft International Telecommunication Regulations and on the Final Report of the PC/WATTC, contained in CCITT Circular No. 67.[17] The Notice observed that the Final Report of the PC/WATTC provides a brief narrative on the work of the group and certain problem areas encountered in developing the proposed draft International Telecommunications Regulations. The Notice also observed that the reports from the individual PC/WATTC meetings cited

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14 CCITT Circular No. 67, 9 November 1987 (Geneva).

15 The Draft International Telecommunications Regulations are divided in the following manner: Preamble; Article 1 - Purpose of the Regulations; Article 2 - General definitions; Article 3 - International network; Article 4 - Services offered to users; Article 5 - Safety of life and priority of telecommunications; Article 6 - Charging and Accounting; Article 7 - Special provisions concerning charging and accounting for maritime telecommunications; Article 8 - Suspension of services; Article 9 - Official service documents; and Article 10 -Final provisions.

16 Annex 2 contains the comments of a number of administrations, including the United States, on the draft International Telecommunications Regulations and the efforts of the PC/WATTC. These comments were offered by administrations following the release of CCITT Circular No. 62 of 25 May 1987.

17 See In the Matter of Draft International Telecommunications Regulations to be considered by the World Administrative Telegraph and Telephone Conference (WATTC-88), Notice of Inquiry, CC Docket No. 88-55, (released February 9, 1988) (summary published in 53 F.R. 5434, February 24, 1988) (hereinafter Notice).

in the Final Report demonstrate the evolution of the draft Regulations. The Notice summarized the U.S. position during the four meetings of the PC/WATTC and stated that while the intent of the PC/WATTC was to develop a draft that would be a single set of Administrative Regulations to encompass all international telecommunications services, it became clear that the participants in the PC/WATTC did not agree on all matters. Therefore, although a single set of draft Administrative Regulations was developed by the PC/WATTC, there was disagreement among the members on questions such as the degree of flexibility afforded member states. The Notice stated that we believe it would be fair to characterize the view held by the U.S.[18] and several other countries as favoring a substantial degree of flexibility that would permit a further liberalization of international telecommunications and the development of a competitive international telecommunications environment. The Notice observed, however, that a subtantial number of other countries held an opposing view favoring an expansion of the applicability of international regulations to all types of service providers.

6. The Notice continued by noting that the most contentious issues of the PC/WATTC fell into the following five areas: (1) to whom should the Regulations apply; (2) which services should be regulated; (3)

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18 The United States statement concerning the draft International Telecommunications Regulations stressed the need for "flexibility" in the Regulations as follows:

> The United States believes that any new regulations emerging from the WATTC must be consistent with the principal purposes of the International Telecommunications Union (ITU) ... [Any] new telecommunication regulations within the scope of the existing Convention must be sufficiently flexible to account for differing national regimes. They must not mandate particular domestic consequences; additionally, they must not foreclose or prejudice domestic choices which Members may make.
>
> Any new telecommunications regulations must be flexible in another way as well. Technological change will result in networks which operate differently than in the past. If new regulations are to be enduring, they must account for how technological change will affect the services generally available to the public.

See U.S. Statement, CCITT Circular No. 67 of 9 November 1987.

should services be defined; (4) what definitions should the Regulations include; and (5) what accounting provisions should the Regulations include. The Notice also stated that the Final Report, which is a compromise text that attempts to take into account concerns expressed during the PC/WATTC process, has several provisions that are of considerable concern to the United States. The Notice expressed particular concern with what appears to be an important internal contradiction in the draft Administrative Regulations. The Notice observed that while Article 1.1[19] and Article 4.1[20] would appear to limit the application of the Regulations to international telecommunications services that are offered to the public, Article 1.7 would appear to expand the application of the regulations to "any entity" providing an international telecommunication service.[21]

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19 Article 1.1 states that:

> The Regulations lay down general principles for the provision and operation of international telecommunication services offered to the public.

20 Article 4.1 states that:

> Members shall promote the implementation of international telecommunication services offered to the public on a world-wide scale and shall endeavour to extend such services to their national network(s).

21 Article 1.7 states that:

> Members shall endeavour to ensure that any entity, established in their territory, using the international telecommunication network to provide an international telecommunication service:
>
> a) is so authorized by the Member,
>
> b) complies with these Regulations, and
>
> c) to the extent considered appropriate by the Member, complies with the relevant CCITT Recommendations.

7. The Notice invited parties to comment on the PC/WATTC Final Report and on the proposed draft International Telecommunication Regulations. Specifically, the Notice sought comment on: (1) possible interpretations of proposed draft Articles 1 and 4; (2) the potential impact of Articles 1 and 4 should the text remain unchanged; (3) proposed suggestions for improvement of the text of Articles 1 and 4; and (4) the appropriate position of the U.S. Delegation to WATTC should the WATTC produce new regulations that are inconsistent with U.S. telecommunications policy. The Notice also invited commenters to submit any additional information or views they believe relevant to the subject matter of this inquiry. Finally, the Notice indicated our intention that information developed within this proceeding, and any conclusions drawn therefrom, would be made available to the preparatory process of the U.S. WATTC Delegation.

III. SUMMARY OF COMMENTS

A. General Comments

8. We received 16 comments[22] and 4 reply comments in response to the Notice.[23] The commenting parties fall broadly within the following

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22 See, Appendix A for a list of parties filing Comments and Reply Comments. ARINC/ATA filed a Motion to Accept Late Filed Comments on March 16, 1988. In its Motion, ARINC/ATA explains that its comments were inadvertently filed by a new courier service on March 10, 1988, with the Securities and Exchange Commission (S.E.C.), but that a courtesy copy was delivered to the Assistant Bureau Chief/International by the March 10, 1988 comment date. ARINC/ATA also states that it has served copies of its comments on all parties filing in this proceeding and on all industry participants in the U.S. WATTC preparatory effort. In these circumstances, we agree with ARINC/ATA's assertion that no interested party is prejudiced by acceptance of the ARINC/ATA Comments and we grant their request to accept late filed comments.

23 Subsequently, in April 1988, the Secretary General of the ITU convened informal consultations with interested member countries to discuss possible changes to the proposed draft International Telecommunications Regulations. While the Secretary General distributed certain informal consultation papers at this meeting, no formal proposals were put forward. On April 29, 1988, PAS filed supplemental comments on the informal consultation papers. While we will include the PAS comments in the record in this proceeding, we take no position at this time on the informal consultation papers referenced in the PAS comments. Moreover, we decline to seek comment on these

groups: large users; enhanced service providers; international common carriers, the RBOCs (Regional Bell Operating Companies) and prospective providers of international facilities. Most commenting parties do not support the adoption of the present draft International Telecommunications Regulations as proposed by the PC/WATTC[24] and many express strong concern that the effect of the proposed draft International Telecommunications Regulations would be to apply international regulation to services that are currently unregulated (including enhanced or "value-added" services and services on private/intra-corporate networks) and to any service provider using the international network to provide any service. ADAPSO, ARINC/ATA, AT&T, BellSouth, Citicorp, DEC, and EDS focused their concern on certain provisions of Articles 1 (Purpose of the Regulations) and 4 (Services offered to users) set forth in the present draft. A number of these parties express strong concern that the draft International Telecommunications Regulations would impose a requirement that Member countries institute domestic entry regulation of providers of any international service and would elevate the CCITT Recommendations to mandatory status.

B. Article 1 - Purpose of the Regulations

1. Article 1.1. - "Offered to the Public"

9. BellSouth, Citicorp and IIA state that read alone the language of draft Article 1.1 and draft Article 4.1 would limit the application of the Regulations to international telecommunication services "offered to the public." Several commenting parties assert, however, that the application may not be limited if these draft provisions are read in conjunction with draft Article 1.2.[25] ADAPSO, ARINC/ATA, BellSouth,

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informal consultation papers at this time. We do believe, however, that consideration of an alternative approach such as that offered by the informal consultation papers might, if members need more time for reflection, invoke the need for the scheduling of a second session of the WATTC that would meet after a more suitable period of time for consultation and discussion. See, e.g., Article 58 supra note 7.

24 MMR is the sole party supporting the adoption of the present draft Regulations. See MMR Comments infra para. 13.

25 Article 1.2 states that:

> In these Regulations, "the public" is used in the sense of the population, including governmental and legal

Citicorp, EDS, IIA, and US Sprint assert, in fact, that the language in draft Article 1.2 makes "public" essentially all inclusive, so as to encompass all services and networks traditionally outside the purview of international regulation within the scope of the draft Regulations.

2. Article 1. 7 - "Any entity"

10. ADAPSO, API, ARINC/ATA, AT&T, BellSouth, Citicorp, DEC, EDS, GE, IBM, IIA, NYNEX, and the U.S. Council express strong concern with the draft language in Article 1.7. These parties assert that the draft language of Article 1.7 would extend the reach of the draft Regulations beyond that of the current Telegraph and Telephone regulations, which apply only to traditionally affected Administrations and RPOAs (Recognized Private Operating Agencies), making the Regulations applicable to "any entity" using the international telecommunication network and forcing such entities to comply with CCITT Recommendations. AT&T asserts that the U.S. should seek to have Article 1.7 deleted from the draft or, at a minimum, seek removal of the requirement that "any entity" be authorized in order to make it clear that the new Regulations only extend to Administrations and RPOAs. BellSouth suggests a similar alternative -- that is a redraft of Article 1.7 that eliminates the words "any entity" and a clear limitation of the new Regulations through the addition of the words "by Administrations or RPOAs" to the end of Article 1.1. The U.S. Council suggests a third variation -- that is, a replacing the "any entity" language in draft Article 1.7 with the words "Administrations and RPOAS". BellSouth, GE, and PAS caution against U.S. acceptance of the wholesale application of the new Regulations to all RPOAs and all services provided by RPOAs as certain services provided by RPOAs do not constitute "public correspondence." These parties observe that providers of certain telecommunication services may acquire the RPOA designation solely to obtain entry into a foreign administrations domain and that this alone should not subject them to further international regulation.

3. Article 1.6 - "CCITT Recommendations"

ARINC/ATA expresses concern that Article 1.6[26] would place

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bodies, within the territory in whole or in part of a Member and the Regulations should be understood to include the underlying international telecommunication transport means used to provide end services.

26 Article 1.6 states that:

In implementing the principles of these Regulations,

an affirmative obligation on Administrations and RPOAs to comply with CCITT Recommendations and thereby elevate CCITT Recommendations to a mandatory status. Citicorp, DEC, and IBM assert, however, that under Article 1.6 CCITT Recommendations would continue to be non-mandatory.

D. Article 4 - Services offered to users

11. ADAPSO, Citicorp, EDS, IBM, and the U.S. Council express concern that the language of Article 4.2 is ambiguous and may create a linkage that would subject all services "defined" or dealt with by CCITT Recommendations to the regulatory provisions of the draft International Telecommunication Regulations. ADAPSO, API, BellSouth, Citicorp, the U.S. Council and US Sprint assert that the U.S. should continue to oppose the inclusion of a definitive list of services and/or service definitions within the draft Regulations. These parties also argue that the U.S. should seek to limit the inclusion of definition in Article 2[27] to the general definitions that are necessary for a proper understanding of the Regulations.

E. Article 6 - Charging and accounting

12. US Sprint supports any effort to revise accounting principles that bring charges closer to cost. US Sprint states that the establishment and revision of accounting rates should be subject to bilateral agreement

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administrations* should also comply with the relevant CCITT Recommendations including any instructions forming part of those Recommendations.

*or recognized private operating agenc(ies).

27 Article 2 (General Definitions) defines the following terms for the purposes of the draft International Telecommunications Regulations:

2.1 - Telecommunication;
2.2 - International telecommunication service;
2.3 - Government telecommunication;
2.4 - Service telecommunication;
2.5 - Privilege telecommunication;
2.6 - International route;
2.7 - Relation;
2.8 - Accounting rate;
2.9 - Collection rate; and
2.10 - Instructions.

and that any international telecommunications regulations must respect national policies regarding accounting and setttlements, such as the Commission's international settlements policy. ADAPSO, ARINC/ATA, AT&T, Citicorp, IBM, IIA, and U.S. Council express concern with the potential negative implications of Article 6 (Charging and accounting) given possible interpretations of certain provisions in Articles 1 and 4. Citicorp observes that it prices its services to its customers on an individualized basis that is dependent on the value of the overall service and not simply on the telecommunications element. Citicorp states that subjecting its operations to the stringent and burdensome provisions of Article 6 would severely limit its flexibility in offering, marketing and pricing new electronic services. ADAPSO states that the Commission should encourage the U.S. WATTC Delegation to prevent the application of Article 6 to entities that, but for the draft International Telecommunications Regulations, would not be deemed Administrations or RPOAs.

F. Article 7 - Special provisions concerning charging and accounting for maritime telecommunications

13. MMR supports the inclusion of Article 7 (Special provisions concerning charging and accounting for maritime telecommunications), as opposed to having such matters continued in the Radio Regulations or having such provisions expressed as CCITT Recommendations. MMR also urged that the U.S. support the retention of the gold franc as a recognized monetary unit for maritime accounting purposes as provided for in the draft Regulations at Section 6.3 of Article 6 and as discussed in paragraph 3.8.2.3 of the Final Report of the PC/WATTC.

G. Position of the U.S. Delegation

14. While the commenters express a nearly uniform view that the current draft Regulations should not be adopted, commenting parties differ in their proposed alternative approaches. ADAPSO, ARINC/ATA, AT&T, BellSouth, DEC, IBM, IIA, NYNEX, and PSI believe that the U.S. Delegation should seek modifications to the proposed draft Regulations (both at the WATTC and via consensus agreements prior to the conference). ADAPSO, EDS and IIA suggest that it may be necessary for the U.S. to refuse to sign the International Telecommunications Regulations should the Regulations adopted by WATTC-88 contain terms objectionable to U.S. interests. ADAPSO, ARINC/ATA, EDS, and IIA, believe that the U.S. should prepare, and, if necessary, take reservations[28] to objectionable portions of a final

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28 Article 77 (Rules of Procedure of Conferences and Other Meetings) Part 16 (Reservations) of the ITU Convention provides that if any decision appears to a delegation to be of such a nature as to prevent its government from ratifying the Convention or from approving the

WATTC-88 text. API and EDS state that the U.S. should consider seeking deferral of WATTC-88 or further deliberations on the draft Regulations. EDS and IBM prefer continued application of the present International Telegraph and Telephone Regulations rather than the adoption of the present PC/WATTC draft Regulations. ADAPSO, EDS, and NYNEX emphasize the importance of using definitive U.S. goals, such as those established in the US/CCITT WATTC Planning Group, in formulating U.S. Delegation positions for WATTC-88. EDS and NYNEX suggest that the U.S. delegation endorse the statement of goals and objectives developed by the U.S./CCITT Study Group B WATTC Planning Group. API, AT&T, BellSouth, Citicorp, DEC, and the U.S. Council urge the U.S. Delegation to exercise caution in modifying the PC/WATTC draft and to approach WATTC-88 in a spirit of consensus, cooperation, and compromise.

IV. DISCUSSION

15. This Commission fully supports the fundamental efficiency, equity and comity goals set forth in the ITU Convention[29] and the preamble to the Draft International Telecommunications Regulations.[30] In this

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revision of the Regulations, the delegation may make reservations, final or provisional, regarding this decision.

29 The Preamble of the ITU Convention states that:

> While fully recognizing the sovereign right of each country to regulate its telecommunication and having regard to the importance of telecommunications for the preservation of peace and the social and economic development of all countries, the plenipotentiaries of the Contracting Governments, with the object of facilitating peaceful relations, international cooperation and economic and social development among peoples by means of efficient telecommunications services, have agreed to establish this Convention which is the basic instrument of the International Telecommunication Union.

30 The Preamble to the Draft International Telecommunication Regulations states that:

> While the sovereign right of each country to regulate its telecommunications is fully recognized, the provisions of the present Regulations are established as a supplement to the International Telecommunication Convention with a view to attaining the purposes of the International

Report and Order, we express our strong hope that WATTC-88 will reach agreement on International Telecommunications Regulations that truly promote the goals of the ITU. We also express our strong concern, however, that the International Telecommunications Regulations drafted by the PC/WATTC contain certain provisions that could undermine each of these goals. Therefore, we recommend that the U.S. Delegation make every effort to work closely with other national delegations in an effort to form an international consensus to refine the present draft International Telecommunications Regulations in a manner that more fully reflects the principal purposes and goals of the ITU.

16. Over the past several decades, we have sought to promote the efficiency, equity and comity goals of the ITU[31] by promoting a competitive market structure in international telecommunications. While we realize that our policy of promoting competition in U.S. telecommunications markets has not been free from difficulties, we believe that the record demonstrates that the United States and, increasingly, other countries have benefited from our pro-competitive policies. At present, over five hundred long distance carriers compete in the United States to provide interstate long distance telephone service.[32] More important, interstate long distance rates have fallen by more than 30% since the beginning of 1984. In addition, during 1987, while the nation's overall rate of inflation increased 4.4%, the Consumer Price Index for telephone services decreased by 1.3%.[33] Moreover, five million households have been added to the U.S.

> Telecommunication Union in promoting the development of international telecommunication facilities and their most efficient operation while ensuring harmony in world-wide telecommunications.

31 Section 1 of the Communications Act of 1934 stresses similar goals:

> so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges....

See 47 U.S.C. Section 151.

32 In addition, the percentage of U.S. subscribers able to choose their primary long distance carrier through easy 1+ dialing increased from 4% at the end of 1984 to 80% at the end of 1987. See Public Notice "Trends in Telephone Service," Industry Analysis Division, Common Carrier Bureau, Mimeo No. 1474 (January 1988).

telephone network since divestiture, with the subscriber penetration level increasing from 91.4% in November 1983 to 92.3% in November 1987,[34] as competition has increased.

17. At the same time use of the U.S. public switched network has increased at an annual rate of growth of 14.2%.[35] This has included significant increases in U.S. use of the international public switched network.[36] Significantly, although revenues for overseas services originating or terminating in the United States increased by $1.74 billion from 1975 to 1986 ($862 million to $2.6 billion), the net revenue outflow paid by U.S. carriers to their foreign correspondents increased from $78.3 million to $1.2 billion. This very significant increase in international telecommunications traffic volumes and revenues has resulted, in large part, from a pronounced downward trend in international message telephone rates, including direct dial rates, that originate in the United States.

18. These figures demonstrate the significant contribution by, and the continuing commitment of, the United States to a more efficient and equitable international telecommunications network. Moreover, these figures demonstrate convincingly that countries can have both competition and

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33 During 1987, rate reductions and refunds ordered by state commissions in the United States exceed the dollar amounts of rate increases granted. As a result, state public utility commissions approved charges in intrastate revenues that resulted in a total net reduction of $460 million. See Public Notice, "Summary of State Telephone Rate Cases," Industry Analysis Division, Common Carrier Bureau, Mimeo No. 1378 (January 20, 1988).

34 In this regard it is important to note that we have worked with state regulatory commissions to establish two types of assistance programs for low income subscribers. One assistance program --referred to as "lifeline" assistance -- is designed to assist poor subscribers in affording the monthly costs of services. Another assistance program --referred to as "link-up America" -- is designed to help low income subscribers defray the installation charges assessed to begin receiving telephone service.

35 See IAD Report, supra note 32.

36 U.S. traffic volumes for international telephone service increased from 42.6 million messages in 1975 to 500 million messages in 1986. See "Trends in the International Communications Industry," Industry Analysis Division, Common Carrier Bureau (December 1987).

universal service. Furthermore, we believe that the U.S. experience and our success in promoting the efficiency, equity and comity goals set forth in the ITU Convention demonstrate the importance of reducing, or eliminating, market entry restrictions for, and unnecessary regulation of, telecommunications[37] and telecommunications-related services.[38] Finally, the current openness of the U.S. telecommunications market is an example of the importance of recognizing the sovereign right of every country to regulate, or to choose not to regulate, telecommunications and telecommunications-related activities.[39]

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37 We have provided for open entry in the provision of public and private interstate long distance services. See, e.g., MTS/WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980). Moreover, we have established a distinction between dominant and nondominant carriers that permits nondominant carriers (those without market power) to offer common carrier services within the United States free from traditional facilities authorization and tariffing requirements. See Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), Third Report and Order, 48 Fed. Reg. 46791 (1985), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 49 Fed. Reg. 34824 (1984), Six Report and Order, 50 Fed. Reg. 1215 (1985).

38 We have consistently declined, for example, to regulate enhanced services. See, e.g., Second Computer Inquiry, Final Decision, 77 FCC 2d 384 (Final Decision), modified on reconsideration, Reconsideration Order, 84 FCC 2d 50 (1980) further modified on reconsideration, Further Reconsideration Order, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), aff'd on second further reconsideration, Memorandum Opinion and Order, FCC 84-190 (released May 4, 1984). See also Third Computer Inquiry, Report and Order, 104 FCC 2d 958 (1986).

39 See, e.g., Regulatory Policies and International Telecommunications, Notice of Inquiry and Proposed Rulemaking, CC Docket No. 86-494, 2 FCC Rcd 1022 (1987). See also Report and Order and Supplemental Notice of Inquiry, CC Docket 86-494 (released March 25, 1988).

19. As a result, we welcome the consensus that developed concerning the question of the inclusion of a "definition of services" in the draft International Telecommunications Regulations.[40] We believe that the inclusion of what would purport to be a comprehensive definition or listing of telecommunications services within the Regulations would not only deter the introduction of new services, but could infringe substantially on the sovereign rights of individual Member countries to choose a more efficient and equitable approach.

20. We are concerned, however, that there is no consensus on other important provisions of the PC/WATTC draft International Telecommunications Regulations. There is no consensus, for example, on the interpretation of the term "the public" contained in Article 1.2 of the draft Regulations in conjunction with the definitions of "Telecommunication" and "International Telecommunication Service" in Article 2.[41] While the definitions for "Telecommunication" and "International Telecommunication Service" are essentially the same as the terms "Telecommunications" and "International Service" used in the ITU Convention and the phrase "offered to the public" contained in Article 1 would appear consistent with the concept of "public correspondence," the PC/WATTC use of the term "public" in Article 1.2 is, at best, the subject of considerable confusion.[42]

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40 Article 2 of the Draft International Telecommunications Regulations is generally limited to those definitions necessary for a proper understanding of the Regulations.

41 Specifically, at least three countries, the U.K., Italy, and the U.S., have questioned the language in Article 1.2 of the the proposed draft regulations.

42 Article 1 (para. 1.2) of the proposed draft Regulations provides:

> In these Regulations, "the public" is used in the sense of the population, including governmental and legal bodies, within the territory in whole or part of a Member and the Regulations should be understood to include the underlying international telecommunication transport means to provide end services.

As a number of commenting parties observe, alternative constructions of this language permits multiple interpretations. For instance, does the term "in whole or part" refer to the "territory", or to the "Member"? If the latter, then does this imply the conclusion that an offering to a group of individuals, a particular business sector or to a single company is an offering to "part" of a Member's population? And, does the word "underlying" imply regulatory authority over all end services that

21. Similarly, there is no consensus on the language set forth in Article 4.2[43] of the PC/WATTC draft International Telecommunications Regulations. Under one interpretation, for example, the second sentence of Article 4.2 would appear to be merely a statement of fact. Under another interpretation Article 4.2 would establish a direct linkage between an unspecified breadth of services in the Recommendations and those services to be regulated pursuant to the draft Regulations.

22. As a result, we conclude that the optimal solution from a U.S. perspective would be for the U.S. delegation to WATTC-88 to seek a consensus to delete Articles 1.2 and 4.2. We believe that in order to promote comity and a spirit of compromise within the ITU, however, the U.S. delegation should be prepared to seek agreement on other alternatives, including certain simple modifications to the draft language in Articles 1.2 and 4.2. We recognize, for example, that by placing the term "in whole or part" in Article 1.2 before the word "territory", to read "... within in whole or part of the territory of a Member ...", the clarity of the draft International Telecommunications Regulations could be improved. Similarly, while we see no reason for the inclusion of the words "... the Regulations should be understood to include the underlying international telecommunications transport means used to provide end services" at the end of Article 1.2, we believe that this language could be changed to read "... the Regulations should be understood to cover only public correspondence or international telecommunication transport services."

23. We recognize that similar accommodations may be necessary to reach a consensus on the language in Article 4.2. We note with interest, for example, that the Director of the CCITT has stated that not all services in the CCITT Recommendations are international telecommunication services

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are dependent on telecommunications networks, or is it meant to refer to the international facility link itself?

43 Article 4.2 states that:

> Administrations* shall cooperate to provide by mutual agreement, a wide range of international telecommunication services and should in so doing and where relevant, comply with CCITT Recommendations. Types of international telecommunication services are defined in the relevant CCITT Recommendations.

*or recognized private operating agency(ies).

and the blending of hardware and software has made the defining of international telecommunication services more difficult.[44] Thus, while we believe that the optimal approach would be the deletion of the second sentence of paragraph 4.2, we recognize that it may be necessary for the U.S. Delegation to seek a consensus on an amendment that might, for example, incorporate the statement of the Director of the CCITT.[45]

24. In contrast, we believe that the current language in Article 1.7 of the draft International Telecommunications Regulations is irreconcilable with the current Telegraph and Telephone Regulations[46] and with the promotion of the efficiency, equity and comity goals set forth in the ITU Convention. While the ITU Member countries subscribe to the present Regulations in a treaty document context and the current Regulations are generally applicable only to Administrations and RPOAs, the draft International Telecommunications Regulations contain provisions that would expand the applicability of the ITU Regulations from Administrations and RPOAs to "any entity" using the international network to provide an international telecommunication service. Indeed, the language in Article 1.7 of the draft International Telecommunications Regulations would appear to extend the WATTC-88 Regulations, if adopted, to entities beyond those contemplated in Article 44 of the ITU Convention.[47]

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44 See PC/WATTC Fourth Report, at 38.

45 The modified language, might state, for example, that "[w]hile not all the services described and/or referred to in the Recommendations constitute international telecommunications services, some types of international telecommunication services are defined in the relevant Recommendations."

46 The general principles to be observed in the provision of the international telegraph and telephone services by Administrations and Recognized Private Operating Agencies (RPOAs) are set in Article 1 of the Telegraph Regulations and Article 1 of the Telephone Regulations adopted in Geneva in 1973. See Final Acts of the World Administrative Telegraph and Telephone Conference (Geneva, 1973).

47 Article 44 states that:

> [Members are] . . . bound to take the necessary steps to impose the observance of the provisions of this Convention and of the Administrative Regulations upon private operating agencies authorized by them to establish and operate

25. We do not believe that the U.S. could, or should, seek to be part of a consensus that would extend the applicability of the ITU Regulations to entities beyond those contemplated in the ITU Convention itself. To the contrary, we strongly recommend that the U.S. Delegation to WATTC-88 seek a consensus on the deletion, or modification, of the language in Article 1.7 of the draft International Telecommunications Regulations to ensure that the final Regulations are consistent with the ITU Convention and U.S. regulatory policy.

26. We believe that the use of the word "shall" in Article 1.7,[48] for example, would be inconsistent with the traditional approach of the ITU concerning the status and use of CCITT Recommendations[49] and the current provisions of the Administrative Regulations.[50] We also believe that the language in Article 1.7 is inconsistent with the traditional consensus language contained in Article 1.4.[51] Therefore, we strongly

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telecommunications and which engage in international services or which operate stations capable of causing harmful interference to the radio services of other countries.

48 Throughout the ITU Convention, the Administrative Regulations (Telegraph Regulations, Telephone Regulations and Radio Regulations) and other ITU documents, the words "shall," "will" and "must" are used in a mandatory sense that describes the obligation of ITU Members, Administrations, and RPOAs to comply with certain provisions or to perform a designated act. In contrast, the words "should" and "may" are used in a voluntary or nonbinding sense of a suggestion or recommendation.

49 ITU Members have long recognized the voluntary nature of CCITT Recommendations. See, e.g., Minutes of the Ordinary Administrative Telegraph and Telephone Conference (Geneva, 1958) at 38-52.

50 The current Telegraph Regulations and Telephone Regulations both state that" [i]n implementing the principles of the Regulations, Administrations* (* or recognized private operating agency(ies) should comply with the CCITT Recommendations, including any Instructions forming part of those Recommendations, on any matters not covered by the Regulations." (Emphasis added.) See Telegraph Regulations and Telephone Regulations, 28 U.S.T. 3293, T.I.A.S. 8586 (1973).

51 Article 1.4 states that:

recommend that the U.S. Delegation work with ITU Members to ensure that the language in Article 1.4, which represents the traditional approach within the ITU that Recommendations and Instructions are "voluntary" or "nonbinding," represents the consensus opinion of WATTC-88.

27. We recognize that there appears to be a consensus on certain other provisions, such as the provisions of Article 6 (Charging and accounting) and Article 7 (Special provisions concerning charging and accounting for maritime telecommunications) of the present draft International Telecommunications Regulations. While we agree with the original position of the U.S. PC/WATTC delegation and the position of the five Nordic Administrations that the specific details of charging and accounting should be included in CCITT Recommendations rather than the International Telecommunications Regulations, in the interest of comity among ITU members, we recommend that the U.S. Delegation support the inclusion of Articles 6 and 7.[52] We also recommend, however, that the U.S. Delegation seek to ensure that these provisions may be applied only to those services currently covered under the existing Telephone and Telegraph Regulations.[53]

References to Recommendations and Instructions in these Regulations are not to be taken as giving to those Recommendations and Instructions the same legal status as the Regulations.

52 The U.S. WATTC Delegation should seek to ensure, of course, that the consensus WATTC-88 position on these issues is not inconsistent with this Commission's international settlements policy. Specifically, we require that operating agreements stipulate: (1) uniform accounting rates (the negotiated rate of reimbursement for service that is shared by originating and terminating entities); (2) uniform terms for the sharing of tolls (the percentage of the accounting rate to be allowed each entity -- generally for direct traffic it is 50-50); and (3) uniform settlement rates (the currency conversion rate used to arrive at the currency stipulated in the operating agreement -- generally gold francs, U.S. dollars, or special drawing rights). See e.g. Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes, Report and Order, 51 Fed. Reg. 4736 (February 7, 1986).

53 In a recent order on further reconsideration, this Commission explicitly declined to apply the requirements of our international settlements policy to the provision of enhanced services internationally. See generally Implementation and Scope of the International Settlements Policy for Parallel International

28. In summary, we share the concern of most commenting parties that the current wording of the draft Regulations would have the effect of: (1) discouraging the procompetitive and liberalization policies of countries like the U.S.; (2) extending international telecommunication regulation beyond application to Administrations and RPOAs to companies and services not currently regulated; (3) discouraging development and provision of innovative technologies to all telecommunications users; and (4) discouraging continued efficient evolution of international telecommunications. As a result, we agree with the commenting parties that the U.S. WATTC-88 Delegation should seek to promote an international consensus to delete or to modify Articles 1.2, 1.7 and 4.2 as contained in the present draft International Telecommunications Regulations.

29. While we believe that a consensus position from the WATTC-88 would best promote the efficiency, equity and comity goals set forth in the ITU Convention, we agree with several commenting parties that it would be prudent for the U.S. WATTC Delegation to prepare draft reservations[54] to those provisions that would deter the achievement of the goals of the ITU and the United States.[55] We believe that the U.S. WATTC Delegation can and should play a lead role, however, in forging an international consensus on the draft International Telecommunications Regulations that is built upon the traditional foundations of the ITU. While we share the view of many commenting parties that the current language of certain portions of the proposed draft Regulations would create an international regulatory climate that is inconsistent with the goals of U.S. telecommunications policy, we believe strongly that the U.S. should make every effort to refine the draft Regulations in a manner that more fully reflects the principal purposes of the ITU.[56] We believe that the guidelines developed by the US/CCITT Study

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Communications Routes, Order on Further Reconsideration, CC Docket 85-204, 3 FCC 1614 (1988).

54 In this regard, we note that the U.S. took reservations on both the current Telegraph Regulations and current Telephone Regulations in 1973.

55 This would include, in our view, Article 1.2, Article 1.7 and Article 4.2.

56 As a result, we believe that it would be premature to recommend that the United States refuse to sign any newly adopted Regulations should they continue to contain provisions that do not promote the goals of the ITU and the Communications Act of 1934.

Group B WATTC can serve as the primary touchstone for that effort.[57] We are confident that the U.S. Delegation to WATTC will be able to use these guidelines not only to to assess international developments before and during WATTC-88, but to achieve a consensus at WATTC-88 that truly advances the efficiency, equity and comity goals set forth in the ITU Convention.

V. PAPERWORK REDUCTION ANALYSIS

30. We have analyzed this Report and Order with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. Sections 3501-3520, and have found that it imposes no new or modified information collection requirements on the public.

VI. REGULATORY FLEXIBILITY ANALYSIS

31. We have determined that the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. Sections 601-612, do not apply to this proceeding. Pursuant to Section 605(b) of the Act, Sections 603 and 604 do not apply because this is not a rulemaking proceeding and does not involve any rule which, if promulgated, would have a significant economic impact on a substantial number of small entities.

VII. ORDERING CLAUSES

32. Pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, this Report and Order **IS ADOPTED. IT IS ORDERED**, That this Report and Order be transmitted to the Executive Director, United States WATTC Delegation, Department of State, for consideration by the preparatory process of the U.S. WATTC Delegation. **IT IS FURTHER ORDERED**, That a copy of this Report and Order be transmitted to the Head of the United States Delegation to the WATTC.

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57 See discussion supra note 12.

33. **IT IS FURTHER ORDERED**, That the Motion To Accept Late-Filed Comments, jointly filed in this proceeding by Aeronautical Radio, Inc. (ARINC) and The Air Transport Association of America (ATA), and the Request by Pan American Satellite (PAS) to Accept Supplemental Comments **ARE GRANTED**.

34. **IT IS FURTHER ORDERED**, That this proceeding **IS TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

The Following Parties Filed Comments:

Association of Data Processing Service Organization (ADAPSO)
American Telephone & Telegraph Company (AT&T)
Aeronautical Radio, Inc. and Air Transportation Association of America (filing jointly) (ARINC/ATA)
BellSouth Corporation (BellSouth)
Citicorp (Citicorp)
Digital Equipment Corporation (DEC)
Electronic Data Systems Corporation (EDS)
GE Communications & Services (GE)
Information Industry Association (IIA)
International Business Machines Corporation (IBM)
Mobile Marine Radio, Inc. (MMR)
NYNEX Corporation (NYNEX)
Private Transatlantic Telecommunications System, Inc. (PSI)
Telecommunications Committee of the American Petroleum Institute (API)
United Airlines (UAL)
US Sprint Communications Company (US Sprint)

The Following Parties Filed Replies:

American Telephone & Telegraph Company (AT&T)
Aeronautical Radio, Inc. and Air Transportation Association of America (filing jointly) (ARINC/ATA)
Pan American Satellite (PAS)
United States Council for International Business (US Council)

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

FCC 88-175
37377

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

May 18, 1988

COMMISSION WARNS LICENSEES ABOUT PAYOLA AND UNDISCLOSED PROMOTION

On February 25, 1988, four persons were indicted in United States District Court in Los Angeles, California, as a result of a two-year investigation of "payola" practices in the broadcast industry. One of those indicted is charged with having made "undisclosed payments from 1980 to 1985 in the form of cash and cocaine" to station personnel in order to secure airplay for certain records. These indictments make this a propitious time for us to remind broadcast licensees that payola is not only a violation of the United States Criminal Code, but may also subject broadcasters to sanctions under the Communications Act.

Payola is the unreported payment to, or acceptance by, employees of broadcast stations, program producers or program suppliers of any money, service or valuable consideration to achieve airplay for any programming. Section 507 of the Communications Act requires those persons who have paid, accepted, or agreed to pay or accept such payments to report that fact to the station licensee before the involved matter is broadcast. In turn, section 317 of the Act requires the licensee to announce that the matter contained in the program is paid for, and to disclose the identity of the person furnishing the money or other valuable consideration.

Both section 317(c) of the Act and section 73.1212(b) of the Commission's rules require that each licensee "exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals" information to enable the licensee to comply with the sponsorship identification requirements of section 317 of the Act. The "reasonable diligence" standard can require a higher duty of care by stations whose formats or other circumstances make them more susceptible to payola. Thus, for example, we would expect stations that report to record charting services to demonstrate greater diligence to prevent improper conduct by its principals and employees than would a station with an all-news format. It may fall short of "reasonable diligence" if the licensee of such a reporting station does nothing more than require its employees to execute affidavits stating that they will not violate laws and regulations prohibiting payola.

Failure to make the reports required by section 507 of the Act can subject the violator to criminal penalties of a fine of up to $10,000 or imprisonment of up to one year, or both. Thus, the Department of Justice has primary jurisdiction for the enforcement of the law. See, e.g., United States v. Vega, 447 F.2d 698 (2d Cir. 1971). The Commission is cooperating with the Department of Justice by referring pertinent evidence that comes to our attention.

The Commission notes that licensees play a critical role in preventing payola, and the Commission's enforcement staff will investigate substantive allegations of payola that come to its attention. In many situations a station may be a victim of payola practices. Therefore, the Commission is willing to assist concerned stations by informally advising them as to whether a particular situation constitutes a potential rule or statutory violation. The Commission emphasizes, however, that a broadcaster's failure to comply with section 317 of the Act and 47 C.F.R. section 73.1212(b) may result in the imposition of administrative sanctions, including monetary forfeiture or initiation of revocation proceedings.

Action by the Commission May 18, 1988. Commissioners Patrick (Chairman), Quello and Dennis.

FCC 88-177
37393

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
ROY H. PARK BROADCASTING	)	
of Virginia, Inc.	)	File No. BRCT-860602KV
	)	
For Renewal of license of	)	
Station WTVR-TV	)	
Richmond, Virginia	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1988 Released: June 2, 1988

By the Commission:

1. The Commission has before it an application for review of the Mass Media Bureau's December 8, 1986 staff ruling, pursuant to delegated authority, denying an informal objection dated October 9, 1986, filed by the Virginia State Unit of the Southern Christian Leadership Conference (SCLC) against the license renewal application for Station WTVR-TV, Richmond, Virginia.

2. After a careful review, we are satisfied that the Mass Media Bureau's ruling was correct[1] and that the application for

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1 We note that SCLC has filed discrimination charges against Station WTVR-TV, with the Richmond, Virginia office of the EEOC. Accordingly, consistent with our practice, we shall allow the administrative and judicial processes to run their course and shall take appropriate action only after a final determination has been reached.

review does not contain sufficient grounds to warrant a reversal of the ruling.[2] Therefore, pursuant to Section 1.115 of the Commission's Rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

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2 In its application for review, SCLC also raises several new allegations. SCLC contends that the staff failed to consider the relative rates of retention between white and black station employees from 1981 to 1986, the biased treatment accorded black employees, and the harassment and intimidation practiced against minority and female employees. However, Section 1.115(c) of the Commission's Rules states that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Therefore, these arguments provide no basis for reversal because they were not initially raised before the Bureau. In any event, even if the matters had been brought properly before the Commission, they raise no questions about the licensee's compliance with the Commission's rules and policies because they are unsupported by specific allegations of fact. Accordingly, no further administrative action is warranted.

However, in its letter denying SCLC's informal objection, the Mass Media Bureau stated that SCLC could seek full Commission review of the decision so long as it complied with 47 C.F.R. Section 1.115. In light of later developments, it might have been better if the Bureau had advised SCLC of other available options, such as seeking reconsideration of the Bureau's decision by supplementing its earlier informal objection with specific allegations supported by affidavits. Although the FCC has no affirmative obligation to assist pro se petitioners, Royce International Broadcasting Co. v. FCC, 820 F.2d 1332 (D.C. Cir. 1987), the Commission does rely on citizen participation to enforce Section 309 of the Communications Act. To better assist such petitioners in the future, we hereby direct the Bureau to provide more complete information to petitioners and objectors concerning the options available to them for further action.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 88-299
37467

In the Matter of	)	
	)	
AT&T Communications	)	Transmittal No. 1215
	)	
Tariff F.C.C. No. 15	)	CC Docket No. 88-471
Competitive Pricing Plans -	)	
Holiday Rate Plan	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1988 Released: September 20, 1988

By the Commission: Commissioner Dennis concurring in part and dissenting in part and issuing a statement at a later date.

I. EXECUTIVE SUMMARY

1. In the Transmittal captioned above, AT&T Communications (AT&T) proposes to introduce a tariff for what it describes as Competitive Pricing Plans. Each Plan appearing in Tariff 15 would offer telecommunications service to a specific customer at rates established to respond to competition. AT&T proposes the first of these Plans in the instant transmittal. Under that plan, AT&T would offer discounts of 5 to 10 percent from AT&T's PRO America II service to the Holiday Corporation, the nation's largest hotel chain. AT&T explains that this Holiday Rate Plan (HRP) responds to an off-tariff discount offering made to Holiday by MCI Telecommunications Corporation (MCI). AT&T states that the prices offered under HRP are still above the prices in MCI's offer, and contends that the plan is justified by competitive necessity, and will recover all costs, increase profits for AT&T, and meet competition.

2. Fourteen companies who compete with AT&T in providing telecommunications services and equipment filed petitions opposing the tariff and the specific plan for Holiday. In addition, the National Telephone Cooperative Association (NTCA), representing about 450 small telephone exchange companies, filed a petition.[1] The competitors, including MCI, argue that the proposal of a substantial discount to a single named customer is unjustly and unreasonably discriminatory, is not justified by competitive necessity either as a matter of law or on the facts presented

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1 Petitioners, and the abbreviations used to refer to them, are listed in Appendix A.

by AT&T, and does not comply with Commission Rules or policies. NTCA argues that the impact on nationwide averaged toll rates should be studied before the proposal is allowed to take effect.

3. Our review of the opposing arguments and our own examination of these questions within the limited period available indicates that this proposal raises significant issues of law and policy. The answers are, however, much less clear. Legal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity. Whether that justification applies to this case, however, depends upon a careful examination of the technological, economic, and regulatory environment in which AT&T's filing is made.

4. In the instant case, the parties dispute the facts, the law and the policies relevant to AT&T's filing. Thus, MCI and other competing carriers at least implicitly claim that their classification under our Rules as non-dominant carriers accords them the right to negotiate the same deals for specific customers which they assert AT&T may not offer, even as AT&T's competitive response to their own offers. The validity of these claims requires examination of our prior decisions and policies in a marketplace characterized by increasing competition among multiple suppliers.

5. Petitioners also challenge, and AT&T defends, the factual basis for the claim of competitive necessity. MCI argues, for example, that HRP undercuts MCI's offer, but has not provided sufficient information regarding its offer for an evaluation of its claim. Several competitors challenge AT&T's calculations.

6. This inconclusive record does not provide the clear demonstration of unlawfulness which would warrant rejection, but does demonstrate the need for careful investigation to clarify the legal issues and, if necessary, to establish policies adapted to competitive offerings to specific customers. We accordingly are setting this tariff for investigation, and to protect both ratepayers and AT&T in the interim, we are imposing certain accounting safeguards pending completion of the investigation. In order to make any determination of the lawfulness of Tariff 15, however, we must also consider the lawfulness of MCI's equivalent offer, and of similar individual arrangements. Therefore, in conjunction with our investigation of AT&T's tariff pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), we will investigate MCI's offer pursuant to the authority granted us in Section 403 of the Communications Act, 47 U.S.C. § 403. We therefore, in this Order, include both AT&T and MCI as parties and designate issues to be addressed by these and any voluntary parties.

7. The record suggests that various carriers have entered into agreements limited to specific customers. We request further information on this point as part of the investigation. To the extent that this is the case, however, we do not believe, for the reasons stated below, that

suspension of Tariff 15 is justified while this investigation proceeds. With respect to NTCA's argument, we include issues affecting nationwide-averaged rates in our investigation. We also note, however, that while those issues may be raised by future Competitive Pricing Plans, the discounts offered to the widely-distributed Holiday Corporation hotels do not appear to present significant concerns in this regard.

II. INTRODUCTION AND BACKGROUND

8. With its proposed Tariff 15, AT&T seeks to introduce the first of what would apparently be a series of Competitive Pricing Plans offering individually priced rates designed to meet other carriers' competitive offerings. HRP offers to the Holiday Corporation a progressive discount from the PRO America II rates AT&T offers in its Tariff F.C.C. No. 1. PRO America II (PRO II) is an optional calling plan [2] under which customers obtain interstate long distance voice service. PRO II requires a customer to pay a fixed monthly fee in return for a discounted usage rate schedule based on seven mileage bands. It is designed for business customers with calling volumes that are larger than a typical MTS customer, but smaller than the volume that would justify obtaining WATS or other services, or who desire the detailed billing and other features not available with WATS.

9. HRP would provide PRO II to Holiday at a further discount based upon volume. Holiday owns 174 hotels, operates 24 others under a management contract, and franchises 1,657 hotels to 756 independent franchisees. Holiday and each of these franchisees would be eligible for HRP. Each would pay a flat monthly charge of $72 per account, i.e., per location.[3] All interstate customer dialed calls would then be discounted from the PRO II rates by the following amounts: (1) 5 percent for the first $500,000 of revenue; (2) 7 percent for the second $500,000 of revenue; (3) 9 percent for the third $500,000 of revenue; and (4) 11 percent for revenue in excess of $1.5 million. The maximum total discount is capped at 10 percent of total revenue. AT&T calculates that at the maximum 10 percent discount, HRP rates would vary (depending on distance) from 9.8 to 12.2 cents per minute during nights and weekends, 13.8 to 17.1 cents during the evening, and 18.5 to 23.0 cents during the day.

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2 See Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 85-540, released Oct. 17, 1985 (OCP Guidelines Order).

3 The monthly charge is applied to each "main billed account," which refers to the account to which charges are billed. This account may include one or more local telephone numbers, but in the HRP situation will ordinarily apply to each location.

10. In justification of these discounts, AT&T explains that competition for Holiday's traffic, which exceeds 25 million minutes of interstate 1+[4] traffic per month, is intense. Holiday and other hotel chains are also said to be very sensitive to price levels, because they resell 1+ service to guests at a profit. AT&T claims that MCI recently entered into negotiations with Holiday to replace AT&T as the 1+ carrier at all corporate and franchise locations. According to AT&T, MCI offered to provide 1+ service at off-tariff rates substantially below either MCI or AT&T's existing tariffed rates, and Holiday has replaced AT&T with MCI on a trial basis at several hundred Holiday hotels. According to an AT&T affidavit, Holiday has informed it that the trial arrangements would be made permanent and extended to all or nearly all Holiday locations unless AT&T offers a substantially more competitive price for 1+ service.

11. AT&T claims that HRP is justitfied as a response to MCI under the established Commission principle of competitive necessity. It contends that to establish competitive necessity, the carrier must show that: (1) an equal or lower priced competitive offering is available to the customer of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet that competitive offering without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users.[5] AT&T claims that HRP is fully justified under this test, because Holiday has made it clear that it will switch to MCI in the absence of a competitive response and the proposed rates will increase the net revenues of AT&T's switched services and thereby benefit all AT&T ratepayers. AT&T also argues that its HRP rates are higher than those proposed to Holiday by MCI. AT&T supports the rates with projections of demand and revenues for 1989, which it claims show that total interstate net earnings will be $1.1 million higher with HRP. Over a 36-month period, AT&T projects that cumulative net revenues will increase by $3.6 million. AT&T also submitted certain information under a request for confidential treatment pursuant to Section 0.459 of this Commission's Rules, 47 C.F.R § 0.459.

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4 "1+" traffic includes long distance calls dialed by the customer. It does not include operator-assisted calls.

5 See Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984) (Private Line Guidelines Order).

III. PETITIONS

A. Factual Issues

12. MCI does not contest AT&T's claim that MCI made an off-tariff proposal to Holiday and has replaced AT&T on a trial basis at certain locations, but does allege that AT&T is incorrect as to several material aspects of MCI's offer, including the price. MCI claims that HRP would result in charges substantially below MCI's offer, because, for example, MCI did not offer a discount below certain usage levels while HRP would discount all traffic by at least 5 percent. MCI also contends that other contractual arrangements between AT&T and Holiday, including AT&T commissions for operator-assisted traffic, a contract for payphone traffic, and a possible "strategic alliance" under which AT&T would use Holiday as a "travel advisor" and use Holiday hotels for AT&T employees' travel, must be evaluated to ascertain the true "price" paid by Holiday. MCI Petition at 10-14.

B. Unreasonable Discrimination

13. AT&T's competitors generally claim in their petitions that the proposal to offer substantial discounts to a single named customer is unjustly and unreasonably discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and of the positive duty of carriers to establish rate schedules with a uniform application to all, under Sections 201(b) and 203 of the Communications Act, 47 U.S.C. §§ 201(b) and 203, as established in cases under cognate provisions of the Interstate Commerce Act. See US Sprint Petition at 4, citing Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 429 (1907), Louisville & N.R. Co. v. Mottley, 219 U.S. 467, 476 (1910), and Chicago & Alton. R. Co. v. Kirby, 225 U.S. 155, 166 (1911). The petitioners argue that selective, single-customer rates such as HRP, which do not offer similar service at similar rates to similarly situated customers, are "blatantly" discriminatory. See Telesphere Petition at 2; MMC Petition at 8.

14. The petitioners also argue that prior decisions and Orders of this Commission bar the proposal. For example, petitioners note that the Private Line Guidelines Order, which AT&T cites as establishing the test for competitive necessity, also states that "a carrier cannot lawfully restrict customers or uses for a volume discounted offering" and that "resellers and sharers must be allowed to take a volume-discounted offering on the same terms as a single, high-volume customer."[6] The petitioners argue that other

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6 Id., 97 FCC 2d at 947.

cases demonstrate a consistent refusal to allow single customer discounts. MCI Petition at 10, MMC Petition at 9, citing Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), mod. on recon., 62 FCC 2d 558 (1977), aff'd sub nom., AT&T v. FCC, 572 F. 2d 17 (2d Cir. 1978), cert. denied. See also Bell Atlantic Telephone Companies, Transmittal Nos. 224 and 226, DA 88-314 (released Mar. 8, 1988). To the extent that competitive necessity may justify otherwise discriminatory rates, the petitioners contend that the doctrine nevertheless does not justify selective rates to individual customers, only generally available rates open to all customers. MMC Petition at 11, US Sprint Petition at 8.

15. Competitors also argue that AT&T is designated by prior Commission Orders as a dominant carrier possessed of market power, and is accordingly subject to restraints that are not applicable to non-dominant carrier-competitors. None of the petitions appears to question the legality of MCI's earlier offer to Holiday, but many assert that AT&T's filing constitutes an attempt to attack collaterally Commission decisions in the Competitive Carrier proceeding, CC Docket No. 79-252, and to misuse the tariff process to set new regulatory policies. US Sprint Petition at 11; MMC Petition at 14. Petitioners claim that the filing is "a lightly veiled attempt...systematically [to] achieve self-deregulation..." ITI Petition at 9. See also MCI Petition at 4; ASC Petition at 3. One petitioner argues that a separate standard for AT&T is appropriate because "the loss of potential or present customers is the necessary price of dominance." CompTel Petition at 6.

16. Petitioners also argue that AT&T's attempted reliance on the Private Line Guidelines Order is misplaced, because that Order dealt only with private line services. The petitioners maintain that the applicable standards are those developed by this Commission in Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 85-450, 50 Fed. Reg. 42,945 (released Oct. 17, 1985) (OCP Guidelines Order). In that Order this Commission stated that Optional Calling Plans by dominant carriers "may not impose unreasonable restrictions on customers, resale, [or] sharing." Id. at 42,954.

C. Competitive Necessity

17. Petitioners also claim that AT&T fails to justify HRP under the three parts of the competitive necessity test, even if it is applicable to single user tariffs. First, petitioners allege that HRP is priced below MCI's offer, and thus HRP is not meeting "an equal or lower priced competitive alternative." Second, petitioners claim that the service is not "reasonably designed to meet the competitive alternative without being unduly discriminatory" by virtue of its discriminatory application to a single customer.

18. Third, petitioners contest AT&T's claim that HRP will contribute to reasonable rates and efficient service to all users. Petitioners claim that AT&T has failed to satisfy the cost-support requirements of Section 61.38 of this Commission's Rules, 47 C.F.R. § 61.38, both because it has withheld its demand data from public disclosure and because it has understated expenses in comparison to AT&T's recent filing for the essentially similar Hospitality Network Service (HNS) or by omitting "Commercial and Marketing Expenses." US Sprint Petition at 13-18; MCI Petition at 16. See also Telesphere Petition at 8-10 (demand is overstated because of overstated growth in Holiday hotels and AT&T should be required to exclude hotels that would likely stay with AT&T without Tariff 15); NTN Petition at 9 (if HRP were actually reasonably priced or profitable AT&T would offer it more widely). Moreover, the net revenue test cannot, one petitioner argues, be applied to an individual customer "deal" because in that case the test only indicates that the offering is priced above its access costs and not whether it is compensatory. The petitioners claim that as applied to a single customer deal, the net revenue test is in reality a test of incremental cost, an approach which allegedly has never been approved by the Commission. MCI Petition at 17-19.

19. Acceptance of HRP and other Competitive Rate Plans filed by AT&T at its discretion would, according to petitioners, portend grave consequences for AT&T's competitors and for all but its largest customers. CompTel Petition at 9. AT&T would be able to acquire or hold as much of the interexchange market as it chooses, and to target predatory prices at specific customers without sustaining the losses that might result from general offerings. MCI Petition at 6; NTN Petition at 3. AT&T has already entrenched its dominant status in hotel traffic through a variety of unlawful practices, according to some petitioners, and the Tariff 15 rates would help AT&T destroy emerging competition where AT&T is still in the process of attempting to lock up this market. Telesphere Petition at 7-8; Cleartel Letter. Petitioners also point out that HRP is very similar to the custom-designed filings in AT&T's Tariff 12, which is already under investigation, and to AT&T's Hospitality Network Service, Transmittal 1197, which is directed to similar customers in the "hospitality industry," but contains "drastically different rates." Telesphere Petition at 10.

20. The competitors' petitions universally call for rejection or, at a minimum, suspension and investigation. NTCA, representing small local exchange carriers, urges suspension and investigation but not rejection. NTCA argues that the tariff proposal could undermine the goal of geographically-averaged long distance rates, because it represents a developing trend of offering discounted rates in those markets most subject to competition. Because competition has not developed in rural areas, and will not do so for some time, this creates widening differences between rates charged to large or urban customers and those charged to small or rural customers. NTCA argues that the present proposal is "the critical point" at which this issue should be confronted to prevent the "camel's nose

under the deaveraging tent." NTCA Petition at 4.

IV. AT&T REPLY

21. AT&T defends its proposal as a legitimate competitive response and argues that there is no basis to reject, suspend, or investigate.

A. Factual Issues

22. AT&T observes that no petitioner disputes that its offer is in response to an off-tariff offer by MCI, and attempts to rebut MCI's claim that HRP would be below MCI's offered rates. It claims, for example, that MCI has used unlikely assumptions of Holiday's usage and irrelevantly assumes trunking efficiencies not associated with 1+ service, which would in any case be available in part to MCI. AT&T also contends that other business relationships between Holiday and AT&T are separate transactions that have no bearing on the HRP rates. It states that the alleged "strategic alliance" between AT&T and Holiday is false. AT&T Reply at 7-9.

23. AT&T also says that it understands that MCI has offered significant off-tariff concessions to large customers such as Westin Hotel Company, United Air Lines, the Department of Defense, Household Finance Corp., Montgomery Ward, and the University of Colorado. It believes that US Sprint has made similar customer-specific concessions to Sony, A&P, and Conagra Corp. among others. Id. at 4 n. **.

B. Unreasonable Discrimination

24. AT&T contends that the substantive requirements of Sections 201, 202, and 203 of the Communications Act apply to AT&T's competitors no less than to AT&T, and that if it is unlawful for AT&T to meet a competitor's customer-specific discount, it is equally unlawful for the competitor to offer the discount in the first place:

> The Commission must decide in the first instance whether the Communications Act permits carriers to compete on the basis of customer-specific prices. If it does, then AT&T must be allowed to meet such competition with compensatory customer-specific offers of its own. If the Act prohibits such competition, then it does so for all carriers, including AT&T's competitors.

Id. at 23. Moreover, AT&T claims that cases cited in support of the proposition that AT&T may offer only "generally available" rates deal with the statutory requirement that carriers provide service only pursuant to their published tariffs, not with the issue of discrimination, and date from the railroad monopoly era. Id. at 16 n. ***.

C. Competitive Necessity

25. AT&T repeats its claim that competitive necessity has long been recognized by this Commission as a pro-competitive justification for price discounts from prevailing tariff rates.[7] It defends HRP as fully justified under both the Private Line Guidelines Order and the OCC Guidelines Order. It defends the fact that HRP is offered only to Holiday on the grounds that AT&T's competitive response is appropriately limited to competition it is meeting, and is thus consistent with the principle that the price discount should be offered no more broadly than necessary to meet competition. Use of a customer-specific discount in such cases is said to be the method of meeting competition least subject to challenge under Commission decisions, AT&T Reply at 10, and consistent with the competitive necessity test embraced by the Supreme Court under the Robinson-Patman Act, see Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

26. AT&T also denies that its customer-specific offering involves unreasonable discrimination, arguing that this question turns on whether the customers not offered the discount are burdened by the discounted price offered to others. Because HRP satisfies the net revenue test, thus making a contribution to common costs, other customers are claimed to be benefitted, not burdened. Moreover, AT&T claims that if it were required to extend the discount to customers beyond Holiday, it could not satisfy the net revenue test, would lose revenues it would otherwise realize, and in that case would burden its other customers with higher costs and rates. A customer-specific response is said to be the only response AT&T can make that will help rather than hurt its other customers.

27. AT&T defends its support material as complying fully with Section 61.38 of this Commission's Rules and as demonstrating that HRP will cover both fully distributed costs and meet the net revenue test. It defends the assumptions used as conservative and argues that objections are simply wrong or fail to understand the filing. For example, it states that its commercial and marketing expenses were included in the "all other" category, and no additional commercial and marketing expenses are associated with HRP because AT&T will market HRP to customers through a national account team dedicated to the needs of that customer. The same expenses would be incurred, it is claimed, if HRP were not offered and the account team were selling other AT&T services. AT&T also points out that the material filed under a request for confidentiality was available to petitioners, subject to protections against disclosure, and that only one petitioner chose to examine it.

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7 See In the Matter of AT&T Tariff F.C.C. No. 250, TELPAK Service and Channels, 37 FCC 1111, 38 FCC 370 (1964).

28. Most basically, perhaps, AT&T contends that its competitors' argument that they are free to "cherry-pick" on a customer-by-customer basis, and then block AT&T's efforts to meet their competition, is harmful to competition, anti-consumer, and wrong under the Communications Act. HRP is said to be "a product of the competition the Commission has allowed and encouraged" and "AT&T is doing only what any competitor would and may lawfully do -- trying to meet competition with a competitive and compensatory price." AT&T Reply at 29.

29. Finally, AT&T asserts that NTCA's concern that HRP will lead to geographically de-averaged toll rates and thereby compromise universal service is unwarranted. "HRP is itself based strictly on nationally-averaged rates, would result in no de-averaging, and as a manifestation of vigorous price competition would promote rather than hinder universal service." Id. at 18 n. ***.

V. DISCUSSION

30. As this summary of the record indicates, two facts are not in dispute -- that MCI proposed an off-tariff discount of its tariffed services to Holiday, and that AT&T responded with its HRP offer. However, virtually every other aspect of this situation is disputed, including the law as it applies to single customer offerings, the application of the law to non-dominant carriers, Commission policies as developed in other proceedings and various matters of fact.

A. Lawfulness of Single Customer Offerings

31. US Sprint's argument that tariff services of general applicability must be made universally available is based upon cases interpreting the cognate and predecessor provisions of Section 202 of the Communications Act, as contained in the Interstate Commerce Act. See para. 13, supra. However, as AT&T points out, these cases refer primarily to the duty of carriers subject to these Acts to provide service under tariff. The Supreme Court in other cases recognized that competition could be a justification for rates which would otherwise be judged unreasonably discriminatory. See, e.g., Texas and Pacific Railway Co. v. I.C.C., 162 U.S. 197 (1896); I.C.C. v. Chicago Great Western Railway Co., 209 U.S. 108 (1908).

32. But none of the parties address what appear to be the most relevant Supreme Court decisions on the issue of competitive necessity. See L.T. Barringer & Co. v. United States, 319 U.S. 1 (1943); Seaboard Air Line Ry. Co. v. United States, 254 U.S. 57 (1920); Wight v. United States, 167 U.S. 512 (1897), or cases interpreting them, e.g., Dresser Industries, Inc. v. I.C.C., 714 F. 2d 588 (5th Cir. 1983). They also, of course, do not consider the application of these cases to the specific provisions of the Communications Act regarding discrimination, Sections 202 and 406, 47

U.S.C. §§ 202 and 406. While these cases seem to indicate that competitive necessity cannot justify separate rates for a single customer, they arose out of specific factual circumstances which may not be analogous to the question of what is unreasonable in the modern, diverse, increasingly competitive telecommunications industry. Indeed, these 45 to 90 year old Supreme Court cases apply the Interstate Commerce Act to railroads, an industry with vastly different technological, economic, and market characteristics as compared to modern day, interstate telecommunications.

33. Of particular importance is the issue raised by AT&T of whether different standards can apply to MCI and other non-dominant carriers than to AT&T. MCI and other competitors appear to assume, or even expressly assert, that they are free to negotiate individual rates and terms for particular customers because they are non-dominant. None of the petitions analyzes this issue in light of the relevant legal precedent. Commission policy is also in dispute. The competitors' view finds some support in our Notice in CC Docket No 79-252, but the Orders in that Docket expressly emphasized that non-dominant carriers remain subject to substantive obligations of Title II of the Communications Act.

34. Moreover, the services now made available to selected subgroups of customers by MCI, AT&T, and possibly other carriers provide a factual context which should help inform consideration of their costs and benefits, especially the question of whether they would benefit or harm customers taking service under general offerings. In view of the dynamism of the telecommunications industry, this recent, actual experience should prove a valuable addition to the record.

B. Applicability of Competitive Necessity to Tariff 15

35. If single customer offerings by a dominant carrier can be justified under competitive necessity, the questions remain of the appropriate standard that should apply and whether AT&T has demonstrated that HRP complies with that standard. The primary legal and policy question is whether the net revenue test, as set out in earlier Orders, is an appropriate measure of compliance with the third requirement of the test for competitive necessity, i.e., the requirement that the offering contribute to reasonable rates and efficient service for all users. The pleadings here are, at best, inconclusive on these issues.

36. The factual questions of whether HRP complies with the standard largely revolve around the relative price of MCI and AT&T's offers. This in turn depends largely upon the accuracy of AT&T's estimates of demand and the precise details of MCI's offer, which we are unable to determine on the current record. Further information and evaluation also appear necessary to resolve the question of whether HRP satisfies the net revenue test and whether the real "price" of HRP must take into account other contractual relationships between AT&T and Holiday.

C. Geographic Rate Deaveraging

37. Finally, AT&T's response to NTCA's concern regarding toll rate deaveraging is unresponsive and incomplete. While the present offering may be based upon underlying rates which remain averaged, HRP is expressly presented as only the first of a potentially unlimited number of such individual offerings. Those future offerings will presumably reflect the level of competition, in both the geographic locations of the customers and the geographic reach of the discounts and other individual terms. It is not implausible to expect that these offerings would primarily benefit large users in urban locations. Since the Holiday hotels are widely dispersed across the country, that concern may be of lesser weight for this filing. But to the extent that the principle established here could apply equally to other offerings that would have the practical effect of giving lower rates to selected urban customers, while excluding customers in small towns and rural areas, NTCA's concern deserves attention.

VI. CONCLUSIONS

38. These various legal, policy, and factual issues plainly warrant investigation beyond that possible during the tariff review process or upon this record. At the same time, the answers are not clear enough to warrant rejection, a remedy which requires demonstrable conflict with the Communications Act or a Commission rule, regulation, or order. See, e.g., American Broadcasting Companies, Inc. v. F.C.C., 663 F. 2d 133, 138 (D.C. Cir. 1980). Neither side, in our view, has sufficiently demonstrated what the correct answers are.

39. The record does indisputably establish that deals for individual customers are being negotiated and offered, at least by MCI and AT&T. Even to decide the present case requires examination of the details of MCI's offer to Holiday. More importantly, adequate consideration of the policy issues raised by these offers necessarily requires a clear picture of the extent of this practice and its circumstances. For this reason, we are designating both MCI and AT&T as parties to this investigation,[8] and designating the legality of the specific terms of their respective offers to Holiday as items for investigation. We also direct that MCI, AT&T, and US Sprint each provide specific information regarding their offers of service

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8 The investigation of AT&T's Transmittal No. 1215 is pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). The investigation of MCI's offer is pursuant to Section 403 of the Communications Act, 47 U.S.C. § 403.

to individual customers, and denials of service at those terms to other customers similarly situated.

40. We do not believe, however, that the issues raised by this filing warrant exercise of our discretion to suspend the transmittal. Suspension is a severe regulatory action because it has the effect of delaying the introduction of new offerings to the potential detriment of ratepayers, the filing carrier, and the competitive process. In deciding whether to suspend, therefore, we attempt to secure the statutory goal of achieving a balance among these interests, the most important of which are those of ratepayers. In this particular case, suspension would have the effect of precluding what may well be a limited compensatory competitive response by AT&T[9] to a lawful, customer-specific offering by MCI[10] to Holiday, thereby impeding competition and injuring the particular customers involved even though remaining ratepayers are no worse off.

41. Thus, suspension would appear to have the effect, in this case, of favoring one side in a competitive rivalry for customers. The competitors who offered individual deals to customers would not only be free to maintain and expand those deals, but would obtain a significant competitive edge as a result of regulation, not of their own merits and efficiency. We are reluctant to apply the suspension power in this manner, especially in view of the fact that allowing HRP to take effect does not represent even a preliminary judgment of its lawfulness, nor does it bar later corrective relief if this proves necessary after the investigation is completed. Given these concerns and the importance of the issues involved, we intend to resolve the investigation promptly.

42. We have also concluded that, pending completion of our investigation, AT&T will be subject to accounting safeguards to reduce the possibility that Tariff 15 rates will be subsidized with revenues from other services. This approach balances the interests of prospective Tariff 15 customers, competing vendors, AT&T, and AT&T's ratepayers. We adopted similar safeguards for AT&T's Defense Commercial Telecommunications Network (DCTN) and Accunet Packet Service and found that such action provided a

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9 MCI has argued that HRP undercuts MCI's offer and therefore is not justified under competitive necessity, but has failed to provide sufficient information about its own offer for us to make such a determination. In addition, no party has proffered evidence to establish that HRP prices fail to cover the offering's fully distributed costs, or satisfy the net revenue test.

10 We note that MCI as well as AT&T is subject to the non-discrimination requirements of §202(a) of the Communications Act.

reliable safeguard against cross-subsidization.[11]

43. Accordingly, we direct AT&T to offer the HRP plan on a separate accounting basis, i.e., revenue, cost, and investment amounts relating to HRP will be excluded from the Interim Cost Allocation Manual (ICAM) for purposes of compliance with applicable provision of Part 65 of the Commission's Rules. We waive ICAM and Part 65 requirements through December 31, 1989 to the extent necessary to comply with this direction.

VII. ISSUES DESIGNATED FOR INVESTIGATION

44. The following issues are designated for investigation:

A. Is HRP lawful under the Communications Act?

1. Under the Communications Act, can the provision of a generally available tariffed service to a single customer, at rates or terms which differ from those provided to similarly situated customers, be justified and, if so, under what circumstances?

2. Is such an offer justifiable for a non-dominant carrier, but not for a dominant carrier? If so, under what circumstances?

3. Specifically, do such offers constitute reasonable discrimination and undue preference under Section 202(a) of the Communications Act if competitive necessity is shown to exist?

4. Does MCI's offer to Holiday Corporation constitute unreasonable discrimination or undue preference under the Communications Act?

B. What are the likely economic and other costs and benefits of allowing single customer offers (a) by non-dominant carriers only; and (b) by both dominant and non-dominant carriers?

C. Does HRP meet the competitive necessity test?

1. Is the net revenue test appropriate to assess whether single customer offers will provide reasonable rates and efficient service to all users?

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11 See AT&T Communications, Inc., Mimeo No. 3502, released Apr. 3, 1986 (DCTN Service); AT&T Communications, Inc., Mimeo No. 3264, released Mar. 25, 1986 (Accunet Service).

2. If the net revenue test is appropriate, does HRP satisfy this test based upon reasonable projections of demand?

3. Should the price considered paid by Holiday to AT&T under HRP take into account other business dealings between Holiday and AT&T, and if so which?

4. Does the price of HRP, as properly considered, under reasonable projections of cost and demand, meet or exceed MCI's offer, without going below it?

D. To what extent have current offers of service to single customers tended to undercut geographically-averaged toll rates, and what is the likely future effect?

45. To aid in this investigation, AT&T, MCI, and US Sprint[12] are directed to submit the following information:

A. List all offers and arrangements for services other than special construction whose rates or terms and conditions are limited to single customers or specific designated customers and are either currently in effect or that were in effect this year (i.e., on or after January 1, 1988).

B. In each case, state whether the offer was for a customer's specialized need, was a discount from otherwise generally available offerings, or was some combination of both, and the basis for such statements.

C. In each case, state whether the offer was made by tariff, contract, or other method, with appropriate references to the location of any documents.

D. In each case, briefly state the terms of the offer and the difference between the offer and the services the carrier provides to the general public, including, where applicable, the percentage rate difference and any rebates, special services, or special accommodations. In each case identify the services to the general public, with appropriate references to any applicable tariff or contracts.

E. In each case, state the basis for believing such an offer is lawful under Section 202(a) of the Communications Act.

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12 The request for information from US Sprint is pursuant to Section 218 of the Communications Act, 47 U.S.C. § 218. We are not designating US Sprint as a party at this time.

46. Carriers who believe that information they will provide in response to our requests should not be made routinely available for public inspection should file a request pursuant to Section 0.459 of our rules, 47 C.F.R. § 0.459.

VIII. PROCEDURAL MATTERS

A. Filing Schedules

47. This investigation will be conducted as a notice and comment proceeding. AT&T and MCI are designated as parties. AT&T and MCI shall file their direct cases, accompanied by the information specified in para. 42, no later than 30 days after the release of this Order. US Sprint shall file the specified information on the same date. The direct cases shall present AT&T and MCI's positions with respect to the issues described in this Order. Pleadings responding to the direct cases may be filed no later than 30 days after the direct cases and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." The direct cases should be addressed in a single pleading. AT&T and MCI may each file a "Rebuttal" to oppositions or comments no later than 15 days after the last timely opposition or comment has been filed.

B. Ex Parte Requirements

48. For purposes of this non-restricted notice and comment investigation, the parties are advised that ex parte presentations are permitted except during the "Sunshine Agenda" period. See generally Section 1.120(a) of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases a final Order; (2) issue a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideraiton, whichever occurs first. See Section 1.1202(f) of the Commission's Rules. During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by the Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Seem Section 1.1203 of the Commission's Rules.

49. In general, an ex parte presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. See Section 1.1202(b) of the Commission's Rules. Any person who submits a written ex parte presentation must provide on the same day it is submitted a copy of the presentation to

the Commission's Acting Secretary for inclusion in the public record. Any person who makes an oral ex parte presentation that presents data or arguments not already reflected in that person's previously-filed written submissions, must provide on the day of the oral presentation a written memorandum to the Acting Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments and must state on its face that the Acting Secretary has been served with a copy and must also state by docket number the proceeding to which it relates. See Section 1.1206 of the Commission's Rules.

50. An original and seven copies of all pleadings shall be filed with the Acting Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Inc., (ITS), Room 246, 1919 M Street, N.W., Washington D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Acting Secretary, Federal Communications Commission, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

51. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, we may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of our reliance on such information is noted in the Order.

C. Paperwork Reduction Act

52. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or record retention requirements as contemplated under the statute. See 44 U.S.C. § 3502(4)(A).

IX. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED, that the petitions for rejection and petitions for suspension and investigation of AT&T Communications Transmittal No. 1215 ARE GRANTED to the extent indicated herein but are otherwise DENIED.

54. IT IS FURTHER ORDERED that an investigation pursuant to Sections 4(i), 4(j), 201-205, 208, 218, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 208, 218, and 403 IS HEREBY INSTITUTED.

55. IT IS FURTHER ORDERED pursuant to Sections 218 and 220(a) of the Communications Act, 47 U.S.C. §§ 218 and 220(a), that AT&T shall separately

account for revenues, costs investment and net earnings associated with HRP service in accordance with paragraph 43, supra, until further notice.

56. IT IS FURTHER ORDERED that Part 65 of the Commission's Rules, 47 C.F.R. Part 65, IS WAIVED to the extent indicated in paragraph 43, supra.

57. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A: LIST OF PETITIONS

American Satellite Company (ASC) - Petition to Reject of Suspend

ClearTel Communications (ClearTel)* - Letter

Competitive Telecommunications Association (CompTel)* - Petition to Reject or Suspend

International Telecharge, Inc. (ITI) - Petition to Reject or Suspend

ITT Communications Services, Inc. (ITT)* - Letter

Martin Marietta Corporation (MMC) - Petition to Reject or Suspend

MCI Telecommunications Corporation (MCI) - Petition to Reject

Microtel, Inc. (Microtel)* - Petition to Reject

National Telecommunications Network (NTN) - Petition to Reject

National Telephone Cooperative Association (NTCA) - Petition to Suspend

Puerto Rico Telephone Company (PRTC) - Petition to Reject

SouthernNet, Inc. (SouthernNet)* - Petition to Reject

Teleconnect Company (Teleconnect) - Petition to Reject or Suspend

Telesphere International, Inc. (Telesphere) - Petition to Reject or Suspend

US Sprint Communications Company (US Sprint) - Petition to Reject or Suspend

* These petitioners support the petition filed by CompTel.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

FCC 88-296
37466

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

September 16, 1988

COMMISSION GIVES INSTRUCTIONS CONCERNING COURT BRIEF IN WINTER PARK COMMUNICATIONS, INC. v. FCC, NOS. 85-1755, 85-1756 (D.C. CIR.)

Following the instructions of a majority of the Commission to defend the constitutionality of its minority preference policy, the General Counsel has filed a brief with the United States Court of Appeals for the District of Columbia Circuit in the case of Winter Park Communications, Inc. v. FCC.

This litigation began in 1985, when Winter Park Communications, Inc. and Metro Broadcasting, Inc. appealed a Commission decision granting the application of Rainbow Broadcasting Company for a permit to construct a new UHF television station to serve the Orlando, Florida metropolitan area and denying the mutually exclusive applications of Winter Park and Metro Broadcasting. The grant of Rainbow's application was based, in part, on the award of a comparative preference to Rainbow for its minority owners' participation in the management of the station.

The case was later remanded to the Commission for further consideration in conjunction with its reexamination of its minority and female preference policies in MM Docket No. 86-484. That inquiry included an examination of the factual predicates for establishing a nexus between minority ownership and program diversity.

In compliance with Public Law 100-202, signed into law on December 22, 1987, the Commission terminated its inquiry in MM Docket No. 86-484 and reinstated its policy of awarding minority preferences in comparative licensing proceedings. Under that policy, the Commission, in order to foster program diversity, awards a comparative preference to a minority applicant for a broadcast station where the minority owner is also integrated into station management.

In further compliance with Public Law 100-202, the Commission, by order adopted February 23, 1988, reactivated the comparative licensing proceeding for the UHF station in Orlando, Florida. It reaffirmed its grant of Rainbow's application.

Winter Park and Metro Broadcasting then resumed their appeal of that decision to the Court of Appeals.

One of the issues raised by the appeal is Metro Broadcasting's challenge to the constitutionality of the Commission's preference policy.

The Commission has concluded that its minority preference policy is consistent with constitutional principles derived from the Supreme Court's decision in University of California Regents v. Bakke, because the award of a minority preference is designed to achieve program diversity and because race is only one of many factors considered in a comparative licensing proceeding.

In the Commission's view, the constitutionality of its preference policy is governed by the D.C. Circuit's decision in West Michigan Broadcasting Co. v. FCC, in which the court in 1984 upheld the Commission's minority preference policy as constitutional. The Supreme Court's decision in Wygant v. Jackson Board of Education does not alter the conclusion that the FCC may adopt preferences based "on the reasonable expectation" that minority ownership promotes diversity of programming.

Finally, the Commission noted that Congress' subsequent ratification of the preference policy, through passage of Public Law 100-202, further supports the constitutionality of minority preferences based on the principles the Supreme Court announced in Fullilove v. Klutznick.

Action by the Commission September 16, 1988 by Public Notice. Commissioners Quello and Dennis, with Chairman Patrick dissenting and issuing the attached statement.

Dissenting Statement
of
Chairman Dennis R. Patrick

In Re: Brief filed in Winter Park Communications, Inc. v. FCC, Nos. 85-1755, 85-1756 (D.C. Cir.)

Few constitutional issues in recent years have stirred as much debate as the question of "benign" discrimination -- the use of racial and gender classifications to benefit particular racial, ethnic or gender groups. Once again the Commission finds itself at the center of this debate. The question presented is whether the FCC has the constitutional and statutory authority to award a preference to minority applicants in comparative broadcast hearings.

In October, 1985, the court, en banc, directed the Commission to file a supplemental brief in Steele v. FCC[1] addressing the FCC's statutory authority to grant preferences and the constitutionality of such grants. In response to the questions raised by the court's order in Steele, the Commission, in a Public Notice and accompanying brief,[2] unanimously concluded, based on Supreme Court decisions applying equal protection analysis, that racial classifications may not be based on the assumption alone, without a factual predicate, that integrated minority owners will result in increased programming and viewpoint diversity. I find the majority's reasoning seriously flawed and unpersuasive as to why subsequent events warrant a reversal of the legal conclusions unanimously reached by this Commission in Steele. Therefore, I cannot join in that portion of the brief addressing the constitutional standards and principles applicable under an equal protection analysis.[3]

I find it unfortunate -- and perhaps a little ironic -- that largely as a result of Congressional action, the Commission is not, in my opinion, in as strong a position to defend the constitutionality of its preference scheme as it might have been had we had the opportunity to review and analyze the substantive comments and empirical data gathered during the Commission's inquiry examining these issues. When it filed its supplemental brief in Steele, the Commission did not decide whether a factual record could ever be established that would support the constitutionality of its preference scheme. On the contrary, the Commission asked the court to remand the case so we could collect evidence and conduct an inquiry into the legal and factual predicate

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1 Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985), vacated and rehearing en banc granted, Order of Oct. 31, 1985, remanded Order of Oct. 9, 1986.

2 FCC 86-387 (released Sept. 15, 1986).

3 Notwithstanding my views on these issues, in light of prior circuit precedents, West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1975); Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975); TV 9, Inc. v. FCC, 495 F.2d 929, (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), I believe that any reconsideration of these precedents would more properly be addressed by the court, sitting en banc, rather than a three judge panel.

of our preference policies. To that end, the Commission unde took such a proceeding designed to provide a fuller record and to gather the empirical data necessary to support retention of its preference scheme.[4] Before the data could be reviewed and findings issued, however, the proceeding was abruptly brought to a halt by a Continuing Resolution which defunded the proceeding and, thereby, precluded additional Commission analysis of the data and arguably prohibited the Commission from conducting a further inquiry into the preference policies.[5] The data collected by the Commission during its short-lived Inquiry was subsequently analyzed in a study by the Congressional Research Service (CRS).[6]

Determining to what extent minority ownership is the factor that results in additional programming and viewpoint diversity can be accomplished by undertaking a multivariate statistical analysis that controls for the demographic and other characteristics of the market that might be expected to affect the quantity of minority-oriented programming. Multiple regression analysis is the statistical technique usually used for this purpose, yet the CRS study contains only a simple comparison of percentages of stations in various minority ownership groups that air minority programming and performs no tests of statistical significance. The Commission was fully prepared to perform a full multiple regression analysis. Had we found a positive correlation, our results would have had manifold greater significance than the CRS results.

One of the Commission's most important goals is to foster increased opportunities in the communications industry for those who have heretofore been underrepresented. This goal must be pursued by means which respect the equal protection guarantees of our Constitution. It is likely that the questions raised in this case will, one day, be more definitively resolved by the Court of Appeals, sitting en banc, or the U.S. Supreme Court. I am sorry the history of events in this proceeding will preclude the Commission from making a more definitive contribution to the resolution of the issue at that time.

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4 Notice of Inquiry in MM Docket 86-784, FCC 86-549, 1 FCC Rcd. 1315 (1986).

5 See Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (signed Dec. 22, 1987). The appropriations legislation prohibits the Commission from using funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" the Commission's policies premised on racial, ethnic or gender classification, except to: (1) close its proceeding investigating the preference policies; (2) reinstate prior policy; and (3) lift any suspension imposed on implementing the policies pending its investigation.

6 See Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? (Economics Division, June 29, 1988).

September 16, 1988

Before the
FEDERAL COMMUNICATIONS COMMISSION *FCC 88-289*
Washington, D.C. 20554

In re Applications of	)	
	)	
RKO GENERAL, INC. (KHJ-TV)	)	DOCKET NO. 16679
Los Angeles, California	)	File No. BRCT-58
	)	
For renewal of Broadcast License	)	
	)	
FIDELITY TELEVISION, INC.	)	DOCKET NO. 16680
Norwalk, California	)	File No. BPCT-3655
	)	
For Construction Permit for New Television Broadcast Station	)	
	)	
WILLIAM G. SIMON et al.	)	
Transferors	)	
	)	
and	)	File No. BTCCT-870420KL
	)	
THE WALT DISNEY COMPANY	)	
Transferee	)	
	)	
For Consent to Transfer of Control of License for KHJ-TV	)	
	)	
and Related Applications	)	File Nos. BPCT-870420KJ, BLCT-870420KH, BLCT-870420KI

E R R A T U M

Released: *September 6, 1988*

By the Commission:

1. On August 19, 1988, the Commission released a memorandum opinion and order (FCC 88-253) in the captioned proceeding. By that action, the Commission approved a settlement agreement involving the transfer of station KHJ-TV in Los Angeles to The Walt Disney Company. Footnote 26 of the memorandum opinion and order is corrected to read as follows:

> We note that LATV will have an opportunity to apply for this frequency when the license term for

California TV stations next expires after termination of this hearing proceeding. 47 U.S.C. § 307(c); 47 C.F.R. §§ 73.1020, 73.3516(e), 73.3539(a).

2. This correction is necessary because the footnote as released indicated that LATV will have an opportunity to apply for this frequency in conjunction with the license term ending December 1, 1988. While that will be true if the parties consummate the settlement agreement before December 1, 1988, under the terms of the settlement agreement Disney is not obligated to close prior to December 15, 1988. It is apparently the parties' expectation that they will close on or about December 15, 1988. See Letter from Richard E. Wiley (counsel for The Walt Disney Company) to H. Walker Feaster, III, Acting Secretary, FCC (Aug. 26, 1988).

3. The sixth sentence of paragraph 12 of the memorandum opinion and order is corrected to read as follows:

> Further, there is the possibility that in the Los Angeles television market -- where the only competing applicant's basic qualifications are also at issue -- no applicant would be found qualified.

This correction adds the word "television" to clarify that the discussion refers to the Los Angeles television proceeding and not to the Los Angeles radio proceeding. See letter from Robert L. Thompson (counsel for Future Broadcasting, Inc.) to John I. Riffer, Associate General Counsel, FCC (Aug. 23, 1988).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 88-360
37556

In the Matter of	)
	)
Petition of the Continental	)
Telephone Company of Virginia	)
for a Declaratory Ruling that	)
it is not Fully Subject to	)
the Commission's Jurisdiction	)
Under the Communications Act	)
of 1934	)

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1988 Released: December 1, 1988

By the Commission:

I. Introduction

1. On November 5, 1987, Contel Corporation (Contel), on behalf of its wholly-owned subsidiary, the Continental Telephone Company of Virginia (CTCV), filed an Application for Review (Application) of the Memorandum Opinion and Order (Order) issued by the Chief, Common Carrier Bureau (Bureau), in the above-captioned proceeding.[1] The Bureau determined that CTCV is not a connecting carrier as defined by Section 2(b)(2) of the Communications Act of 1934, as amended (Act).[2] The Bureau reasoned that CTCV is ineligible for the Section 2(b)(2) exemption because it is engaged in the provision of interstate service through a physical connection with Contel ASC, an interstate carrier that is also a wholly-owned subsidiary of Contel. After review of Contel's Application and additional comments submitted by interested parties,[3] we affirm the Bureau Order.

II. Background

2. Congress has given this Commission broad jurisdiction over

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1 2 FCC Rcd 5982 (1987).

2 47 U.S.C. § 152(b)(2). See infra para. 2.

3 Comments in support of Contel were filed by the United Telephone System companies (United), United States Telephone Association (USTA), GTE Telephone Companies (GTE), National Telephone Cooperative Association (NTCA), Alltel Corporation (Alltel), and Southland Telephone Company (Southland). Contel filed reply comments.

"interstate communication" and "persons engaged . . . in such communications . . . ."[4] Section 2(b) of the Act, however, identifies specific services or carriers that are not subject to this broad jurisdiction. The relevant exemption is that contained in subsection (2) of Section 2(b). That section provides, in pertinent part, that only certain sections of the Act apply to:

> (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . .

Carriers described in this subsection are defined by Section 3(u)[5] as connecting carriers. Thus, as a result of Section 2(b), connecting carriers are subject to more limited jurisdiction under the Act than that applicable to "fully subject" carriers.

3. Contel states that prior to 1975, this Commission treated CTCV as a connecting carrier. In that year, the Chief, Domestic Facilities Division, determined that CTCV's network configuration serving Knotts Island, which lies partly in Virginia and partly in North Carolina, resulted in CTCV being a fully subject carrier because it had a toll line running from its switch in the North Carolina section of Knotts Island to a switch in Ship's Corner, Virginia.[6] In 1986, CTCV requested a Commission determination that it had become a connecting carrier under the Act since it had reconfigured its facilities used to serve the North Carolina section of Knotts Island by replacing the switch that had previously served the North Carolina portion of Knotts Island with a "dumb" remote switching unit.[7] The CTCV petition said that the reconfiguration resulted in all traffic from the North Carolina section of Knotts Island being transmitted to Ship's Corner, Virginia, for initial switching. Under the prior configuration only toll traffic was transmitted to Ship's Corner. According to CTCV, this change eliminated the separate toll lines that resulted in CTCV's classification as a fully subject carrier in 1975, and therefore, since its present network configuration is functionally similar to that of its pre-1975 arrangements, it again has connecting carrier status.[8]

4. In response to CTCV's petition, the Bureau requested that CTCV

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4 47 U.S.C. § 152(a).

5 47 U.S.C. § 153(u).

6 Letter from Chief, Facilities Division, Common Carrier Bureau, to Law Offices of Jeremiah Courtney, dated April 4, 1975.

7 Letter to James Keegan, Chief, Domestic Facilities Division, Common Carrier Bureau, from CTCV dated August 29, 1986 (CTCV's Petition).

8 In 1975, CTCV and Contel ASC were not affiliated carriers.

provide information on CTCV's relationship with Contel ASC.[9] Contel responded on July 1, 1987. That response acknowledged that Contel ASC, a wholly-owned subsidiary of Contel, is an interstate carrier providing voice, data, and video service to several commercial and government customers in CTCV's serving area.[10] That response stated that these customers purchase service directly from Contel ASC and that Contel ASC and CTCV do not have any joint marketing or other sales arrangements. Contel also stated that Contel ASC obtains special access facilities from CTCV's access tariffs to connect its customers in CTCV's serving area to its national network. Finally, Contel explained that CTCV does not obtain any services from Contel ASC for purposes of offering interexchange services to CTCV's customers and has no plans to do so in the future. Under these facts, Contel asserted that CTCV is not engaged in interstate communications within the meaning of Section 2(b)(2) of the Act. After reviewing this additional information and comments thereon, the Bureau determined that CTCV is engaged in interstate communications through a physical connection with its affiliate Contel ASC, and therefore is not a connecting carrier as defined by the statute.

III. Positions of the Parties

5. In its Application, Contel contends that the Bureau erred. It asserts that this proceeding raises an interpretation of law question that has not been resolved previously by this Commission. Contel and United contend that the Bureau incorrectly focused on Contel ASC's interstate nature rather than looking at CTCV's operations. Contel again asserts that CTCV is not "engaged in interstate communications" because it does not use the facilities of Contel ASC to provide any of CTCV's customers with interstate or foreign communications. Moreover, it argues that the act of subscribing to CTCV exchange services is separate from the act of subscribing to Contel ASC interstate services, and the companies themselves are independent of each other in their business and service offerings. Contel therefore asserts that there is no joint offering of service by CTCV and Contel ASC that would constitute CTCV being "engaged" in interstate or foreign communication for purposes of Section 2(b)(2).[11] Contel also states that CTCV merely leases special access facilities to Contel ASC on a tariffed, arms-length basis in accordance with requirements imposed by Section 201(a) of the Act[12] and this Commission. The Bureau's decision, according to Contel, straps CTCV with fully subject status as a result of its compliance with the access requirements, a result never intended by Congress.

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9 Letter from Gerald Brock, Chief, Common Carrier Bureau, to Arthur Blooston, Esq., and Benjamin H. Dickens, Jr., Esq., dated June 9, 1987.

10 Letter from Lawrence W. Keller, Director-Federal Regulatory/Telephone, Contel Service Corp., to Gerald Brock, Chief, Common Carrier Bureau, dated July 1, 1987.

11 Application at 7-8.

12 47 U.S.C. § 201(a).

6. Contel submits that this Commission must reverse the Bureau's action as being inconsistent with the policy that Congress sought to implement in this section. Contel contends that the legislative history of Section 2(b)(2) indicates that Congress intended that the term "physical connection" mean "a physical connection with a toll line, for long distance calls,"[13] and states that such a connection is not present between CTCV and Contel ASC. Contel also observes that the factual situation in the instant case is distinguishable from that which led this Commission to conclude that the Bell Operating Companies (BOCs) were fully subject carriers following the American Telephone and Telegraph Company (AT&T) divestiture.[14] Contel states that the BOCs own, operate, and maintain physically interstate communication facilities, whereas CTCV's facilities are entirely local in nature.

7. GTE urges this Commission to conclude that access service furnished by CTCV to Contel ASC does not negate CTCV's connecting carrier status. GTE and NTCA submit that this is a case of first impression because tariffed access service is a recent development in which the interexchange carriers (IXCs) are viewed as customers of the exchange carriers. GTE contends that Congress used the term "physical connection" in Section 2(b)(2) in a special sense to denote traditional carrier-to-carrier interconnection, as opposed to the furnishing of communication service under tariff regulation indifferently to affiliated or unaffiliated customers. Both GTE and United argue that the language of Section 201(a) of the Act supports this interpretation.[15] GTE notes that Section 201(a) has two distinct clauses, the first addressing a carrier's duty to provide service to customers upon reasonable request, and the second addressing the establishment of physical connections with other carriers. It submits that the provision of communication service to customers is the underlying premise of the first clause of Section 201(a), as well as being the basis for Sections 201(b) and 202-205, which contain the substantive standards and tariffing procedures applicable to the provision of such service. GTE argues that in contrast, the second clause of Section 201(a)

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13 Application at 9, quoting from 78 Cong. Rec. 8846 (1934), statement of Sen. Clark.

14 Declaratory Ruling on the Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies, 2 FCC Rcd 1750 (1987).

15 Section 201(a) provides:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

contemplates through routes and division of charges, rather than provision of service by tariff pursuant to the just and reasonable rates requirement. GTE further asserts that the second clause contemplates obligations dependent on Commission action, while the Section 201(b) just and reasonable standard is imposed unconditionally on the carrier providing service. Finally, GTE asserts that the Section 201(b) provision generally permitting a common carrier subject to this Act to enter into service contracts with any common carrier not subject to this Act, if not contrary to the public interest, is further evidence that carrier-to-carrier relationships are not treated as communication services furnished to customers.

8. GTE also asserts that legislative history indicates Congress distinguished carrier interconnection from provision of communication service under tariff. It observes that clause 2 of section 201(a) appears to have been added to the original bill in response to representations from a non-AT&T exchange carrier that it was unfairly denied interconnection, although, according to GTE, Congress could have used the first clause of Section 201(a) to give specific recognition to the problem of an independent struggling with the Bell system. GTE concludes that the phrase "physical connection" was thus introduced in association with through routes and divisions of charges, the means of carrier interconnection in 1934. GTE concludes from this that the phrase "physical connection" in Section 2(b)(2) must be considered in this special context, and that, therefore, Congress did not contemplate that furnishing service under tariff regulation would constitute the "physical connection" that would result in denial of connecting carrier status to any exchange carrier.[16] GTE argues that this conclusion is reinforced by a general congressional intent to keep the independent companies subject to state jurisdiction since their activities were largely local in nature and to avoid burdening this Commission and the independent companies. Finally, GTE asserts that this Commission has, at least implicitly, recognized that federal tariffing of a particular service or a Section 214 application with respect to such service, does not necessarily deny connecting carrier status.[17] Finally, GTE and United observe that this Commission has not suggested that the provision of exchange access service makes an exchange carrier a fully subject carrier.

9. USTA states that the Bureau's decision ignored well established principles that adjudicatory bodies should not reach issues that need not be resolved. USTA asserts that there was no need for the Bureau to address whether CTCV's affiliation with Contel ASC resulted in CTCV being a fully subject carrier and argues that we should resolve the CTCV case solely on the basis of the network reconfiguration that CTCV requested the Bureau to address. The Bureau decision, according to USTA, has far-reaching ramifications, creates unnecessary uncertainty and potential new regulatory risk for many exchange carriers, and may diminish the

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16 GTE Comments at 5-6.

17 Id. at 10, citing Capital City Telephone Co., 3 FCC 189 (1936), (holding that when a telephone carrier furnishes a radio station wires or wire services for radio communication, the status of a carrier which would otherwise be classified as a connecting carrier is not changed).

extent of competitive interexchange service if the rationale extends to exchange carrier participation in the resale market. USTA argues that this Commission has recognized that it was the intent of Congress to exempt smaller carriers from our jurisdiction, and given CTCV's relatively small size and location, there is no reason why this Commission should be interested in maintaining CTCV as a fully subject carrier. USTA, United, and Alltel argue that the act of engaging in interstate communication demands more than simple interconnection and requires more than the provision of interstate access on a nondiscriminatory common carrier basis, particularly when only limited private line interconnections are involved. USTA states that it agrees with GTE that, while interstate access is interstate service for jurisdictional purposes, the provision of exchange access service does not subject carriers to our plenary jurisdiction. It notes that if jurisdiction were premised on the provision of access service, all exchange carriers would be fully subject carriers. It states that this would be inconsistent with the intent of Section 2(b)(2).

10. USTA, United, and Alltel assert that the legislative history and early Commission precedent interpreting Section 2(b)(2) require that the exchange carrier participate in the delivery of joint, through service, developed and offered as a distinct, integrated, and typically end-to-end offering by the exchange carrier and an IXC. In that situation, USTA states, the exchange carrier has, or concurs in, a tariff and holds itself out as offering an interstate, interexchange service, with responsibility for dealings with customers.[18] USTA states that the intent of Section 2(b)(2) was to reverse Interstate Commerce Commission precedent that had based federal jurisdiction upon mere connection to interstate lines, and that the Order in this proceeding contradicts that purpose.[19] USTA contends that in Classification of Telephone Companies,[20] this Commission held that common ownership and interconnection were not sufficient to render an exchange carrier fully subject. USTA also questions whether the Bureau had the necessary delegated authority to adopt the Order. Finally, USTA argues that the Order appears to be inconsistent with a recent Federal Executive Order that suggests that in the absence of clear statutory authority, the presumption of sovereignty should rest with the individual states.[21] USTA also contends that it is inconsistent with

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18 USTA states that exchange carriers that met at a state boundary and did not offer a joint, through service, have retained their connecting carrier status. USTA Comments at 8 n. 10. Additionally, USTA and United submit that this Commission has rejected the idea that the purchase of service by nondominant IXCs from exchange carriers creates a joint service arrangement or that it is analogous to the separations and settlements process between AT&T and the independent telephone companies. Those comments cite Exchange Network Facilities for Interstate Access, 90 FCC 2d 128, 129 (1978).

19 USTA Comments at 5 n. 8.

20 3 FCC 37 (1935).

21 Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 30, 1987).

the Supreme Court decision in Louisiana Public Service Comm'n v. FCC.[22]

11. NTCA states that the Bureau did not discuss the implications of the change from settlements to access charges, its relevance to the exemption provided by the statute, or the significance of the fact that the access is provided to a nondominant carrier. This latter point, according to NTCA, will result in this Commission eliminating its regulation of an interstate carrier whose activities have national implications, while increasing its regulation of a local carrier already extensively regulated by the Commonwealth of Virginia. NTCA indicates that to the extent exchange carriers have a relationship with IXCs in the access environment, it is merely as a billing agent. NTCA states that large numbers of independent exchange carriers presently are affiliated with or are considering affiliation with interstate IXCs.[23] It submits that the different relationships that now exist may justify different classifications than in the past. NTCA suggests that if we deny the Application, we should institute a proceeding to determine whether additional small companies should be excluded from application of Sections 206-221 of the Act. Southland supports Contel's Application and agrees with NTCA that that the Order would be particularly burdensome to smaller independents that provide access to affiliates. It argues that there are no public policy or administrative benefits that outweigh the burden on such carriers resulting from being classified as fully subject carriers.

IV. Discussion

12. Contel's Application presents the question of the scope of the Section 2(b)(2) exemption from our jurisdiction over carriers engaged in interstate communications. Contel asserts that CTCV has become a connecting carrier because it has reconfigured its exchange network to eliminate certain toll lines that had previously been the basis of its fully subject carrier status. It further contends that CTCV is not engaged in the type of interstate communications Congress intended to be fully subject to this Commission's jurisdiction despite its affiliation with Contel ASC.

13. It is well established that a carrier claiming an exemption from our jurisdiction bears the burden of demonstrating that it qualifies for the exemption.[24] Several parties have urged us to grant CTCV connecting carrier status based on its network reconfiguration alone, without considering the implications of CTCV's affiliation with Contel ASC. However, a carrier seeking such a

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22 106 S.Ct. 1890 (1986).

23 See, e.g., Indiana Switch Access Division, File No. W-P-C-5671, 1 FCC Rcd 634 (1986); Iowa Network Access Division, File No. W-P-C-6025, DA 88-293 (released Feb. 29, 1988).

24 See Rochester Telephone Corp. v. U.S., 23 F. Supp. 634, 636 (W.D.N.Y. 1938), aff'd, 304 U.S. 125 (1939); Interstate Telephone Company, 3 FCC 170 (1936).

jurisdictional exemption must demonstrate more than changed circumstances regarding one basis of federal jurisdiction;[25] it must show that it satisfies all aspects of the Section 2(b)(2) exemption. Thus, for carriers that are providing interstate service solely through physical connections with other carriers, Congress identified the absence of a direct or indirect control relationship between the physically connected carriers as one of the criteria for qualifying as a connecting carrier pursuant to Section 2(b)(2). Therefore, CTCV must carry the burden on that point as well. After reviewing the record, we conclude that CTCV has not met its burden of demonstrating its eligibility for a Section 2(b)(2) exemption. Indeed, we conclude, as discussed below, that, based on the record and our review of the applicable law, it is clear that CTCV does not meet the statutory requirements for connecting carrier status.

14. The analysis of any jurisdictional issue should begin with the language of the statute itself. Section 2(a) identifies this Commission's jurisdictional mandate. That section provides, in pertinent part:

> The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio . . . .

This Commission and the courts have repeatedly held that our jurisdiction under this section of the Act includes the entirety of the interstate communication from its inception to its completion.[26] Contel concedes that CTCV originates and terminates interstate communications in providing interstate access to Contel ASC, an interstate carrier. Thus, CTCV is a fully subject carrier unless it falls within one of the Act's limitations on this Commission's jurisdiction over interstate telecommunications.

15. Contel asserts that CTCV is a connecting carrier pursuant to the provisions of Section 2(b)(2). The Act defines a connecting carrier as a carrier "engaged in interstate or foreign communication solely through physical connection

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[25] It is unclear that CTCV's network reconfiguration altered its jurisdictional status as a fully subject carrier. However, because we resolve the question of CTCV's jurisdictional status on other grounds, we need not conclusively determine that issue. Nor do we address any other basis of jurisdiction that might exist.

[26] See, e.g., Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930); United States v. American Telephone & Telegraph, 57 F.Supp. 451, 454-55 (S.D.N.Y. 1944), aff'd sub nom. Hotel Astor v. United States, 325 U.S. 837 (1945) (regardless of the handling of a communication by carriers and others, the Commission's regulatory jurisdiction over interstate communication extends from a communication's inception to its completion). See also Ambassador v. United States, 325 U.S. 896 (1945).

with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . ." The special access facilities that CTCV provides Contel ASC are physically connected to the facilities of the latter carrier; and there is no dispute that the two carriers are under the common control of Contel. Thus, under the plain language of the Act, CTCV is a carrier engaged in interstate communications through a physical connection with an interstate carrier that is under common control with CTCV. The Act therefore does not classify CTCV as a connecting carrier, and under the plain meaning rule of statutory construction,[27] we could conclude our analysis here. However, we shall address the other arguments raised by the parties.

16. Shortly after the Act was enacted, this Commission examined the scope of the exemption contained in Section 2(b)(2). In Classification of Telephone Companies, we identified several considerations relating to the determination of our jurisdiction in connection with the question of which telephone companies were to be exempt from certain reporting requirements that we had established. There, we stated:

> 1. Every wire telephone carrier owning, maintaining, or operating a toll line which crosses a state or national boundary is subject to all the provisions of the Communications Act of 1934.
>
> 2. A wire telephone carrier which neither demands nor receives any charge, compensation, or commission on interstate communication or service is not subject to the Act.
>
> 3. Every wire telephone carrier with one or more exchanges, or one or more toll lines within a single state, participating in interstate communication by physical connection with another wire telephone carrier within the same state, is subject to Sections 201 to 205 only of the Act, except when the matter of control referred to in Section 2(b)(2) of the Act is involved.
>
> 4. The phrase "directly or indirectly controlling or controlled by, or under direct or indirect common control with" as used in Section 2(b)(2) of the Act contemplates a mixed question of fact and law to be determined in each case heard and considered by the Commission.[28]

Two important points about our contemporaneous understanding of the requirements of Section 2(b)(2) can be discerned from that decision. First, we clearly recognized that, when interstate service was being provided through physical connections between carriers, the presence of control in the carrier relationship created a jurisdictional nexus.[29] Second, we indicated that the question of control was a

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27 See generally, Sutherland Stat Const § 46.01 (4th Ed).

28 Classification of Telephone Companies, 3 FCC at 39.

29 USTA contends that this decision established that more than physical connection and common ownership is required to make an exchange carrier a fully subject carrier. USTA is correct in that the common ownership must meet the control

mixed question of fact and law.[30]

17. In the period following the 1935 decision in Classification of Telephone Companies, we addressed the application of Section 2(b)(2) to specific carriers in numerous decisions.[31] Each of these early cases involved a carrier with operations that did not include any lines crossing a state boundary and a physical connection between that carrier and a fully subject carrier. The focus of these decisions was on whether a control relationship existed between the two carriers. In Interstate Telephone Company,[32] for example, we found the subject carrier to be a connecting carrier despite the ownership by the Illinois Bell Telephone Company, a physically connecting, fully subject carrier, of a minority stock interest in Interstate Telephone Company. There, we concluded that the amount of stock owned and Interstate's manner of operation indicated that Illinois Bell Telephone Company did not have control of Interstate. In the instant case, CTCV and Contel ASC are under the common control of Contel since each is wholly-owned by Contel. Thus, the Bureau's Order is consistent with the plain language of the statute and with longstanding Commission precedent.

18. The parties to this proceeding raise several arguments regarding the interpretation of the statutory language.[33] First, Contel and others argue

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relationship identified in the section. However, the decision does not suggest that a joint service offering is required.

30 Several parties argue that we should consider evolving carrier relationships such as those presented by the Indiana Switch and Iowa Access Division. Since each case is a mixed question of fact and law, and the facts of those cases, or any other case, are not before us, we limit our discussion to the facts relating to CTCV. The other situations may raise issues relating to the control that any carrier may have over any party involved in the operation.

31 See, e.g., Capital City Telephone Co., 3 FCC 189 (1936); Princeton Telephone Co., 3 FCC 164 (1936); Cass County Telephone Co., 3 FCC 406 (1936).

32 3 FCC 170 (1936).

33 USTA also refers to a federal Executive Order suggesting that in the absence of clear statutory authority, the presumption of sovereignty should rest with the individual states. Strictly speaking, the policies reflected in the Executive Order, which was released after the Bureau's Order, apply only to Executive departments and agencies, and not to independent agencies such as this Commission, Exec. Order 12,612, 52 Fed. Reg. 41685 (Oct. 30, 1987). In any event, the Bureau's decision is consistent with the Executive Order. As discussed in this Order, the plain meaning of the statutory language and its legislative history make clear that this Commission is vested with jurisdiction of CTCV. Moreover, the Bureau's interpretation of Section 2(b)(2) does not affect the sovereignty of state regulatory commissions. State power to regulate intrastate telecommunication services of connecting carriers and fully subject carriers is preserved by Section

that CTCV is not "engaged in interstate . . . communication" for purposes of Section 2(b)(2) because CTCV does not offer interstate communication services to any customer and does not concur in the tariff of any carrier for the provision of a joint interstate communication service. We cannot agree with this reading of the statute. The independent exchange carriers today provide roughly the same portion (the origination and termination) of an interstate communication service they provided in 1934. The exchange carriers that contended in the 1930s before this Commission that they were exempt from this Commission's reporting requirements did not question that they were engaged in interstate communications.[34] There is no indication that the 1935 Commission believed that to be "engaged in interstate communications," a carrier had to be part of a joint service. It is unlikely that Congress intended to vest jurisdiction in this Commission on the tenuous expedient of whether or not the connecting carriers received compensation in the form of a contract specifying the settlement terms of a joint service arrangement or from tariff charges.[35] Thus, if Congress had intended that fully subject status require a physical connection with an affiliated carrier with which that carrier offered a joint interstate communication service, it presumably would have so stated.

19. Furthermore, the parties prove too much with the argument that CTCV is not engaged in interstate communications as intended by Section 2(b)(2). If this were the case, CTCV would not satisfy even the threshold criterion for the Section 2(b)(2) exemption, which applies, by its terms, only to carriers "engaged in interstate . . . communications . . . ." Furthermore, a carrier not engaged in interstate communication would not be subject to Section 2(a) and thus would not be subject to any provision of the Act.[36] Since the Act subjects connecting carriers to the provisions of Section 201-205, it follows that connecting carriers must be engaged in interstate communications or they could not be subject to those sections. Indeed, a number of parties concede that carriers like CTCV are "engaged in interstate communication" for purposes of Section 2(a), but argue that they are not so engaged for purposes of Section 2(b)(2). These parties, however, offer no coherent explanation as to why Congress would have used the exact same language in two successive subsections of the Act to mean two very different things. Therefore, we conclude that the "engaged in interstate . . . communications" language of Section 2(b)(2) correlates with the broad meaning of Section 2(a) of the Act, and CTCV is engaged in interstate communication under both sections of the

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2(b)(1).

[34] See, e.g., Princeton Telephone Co., 3 FCC at 165.

[35] Exchange carriers in 1934 were the recipients of compensation for the portion of the interstate service they jointly provided with AT&T, and that compensation was generally in the form of settlements from AT&T pursuant to contract. Today, compensation is generally accomplished pursuant to tariffed access charges.

[36] See supra, para. 14.

Act.[37]

20. A related argument parties raise to support a finding that CTCV is a connecting carrier is that the term "physical connection," as used in Section 2(b)(2), does not encompass the customer-type relationship that exists in the provision of interstate access by an exchange carrier to an IXC. This argument is premised on an analogy to the use of the term "physical connection" in the second clause of Section 201(a). The parties argue that this clause, which imposes on carriers a duty "to establish physical connections with other carriers . . . [and] to establish through routes and charges applicable thereto and the divisions of such charges . . .," indicates that Congress intended that the physical connections in both sections 201(a) and 2(b)(2) be associated with the provision of a joint service because divisions of charges take place only when a joint service is involved. These parties contend that since CTCV only connects with Contel ASC through special access facilities provided pursuant to interstate tariff, the two carriers are not physically connected for the purposes of Section 2(b)(2).[38] We do not find that argument persuasive. The analysis is based upon an interpretation of Section 201(a) of the Act that directly contradicts the interpretation we adopted in the Access Charge Order.[39] The Access Charge Order expressly rejected a claim that our

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[37] Several parties argue that if the provision of interstate access constitutes being engaged in interstate communication for purposes of Section 2(b)(2), every exchange carrier would be a fully subject carrier, which would nullify the Section 2(b)(2) exception. This argument misconstrues the holding of the Bureau's Order. It is not the provision of interstate access alone that triggers fully subject status. It is the provision of interstate communications through a physical connection with an affiliated carrier in the described control relationship that triggers such status here. The Bureau concluded that the CTCV provision of interstate access to Contel ASC constitutes engaging in interstate communication in a manner that disqualifies CTCV for the Section 2(b)(2) exemption. We concur.

[38] GTE also contends that the language of Section 201(b) supports the assertion that carrier-to-carrier relationships are treated differently from customer-type relationships under the Act (see supra para. 7.), and that "physical connection" does not include the provision of access service by exchange carriers indiscriminately to IXCs. We reject this argument. The reference by Congress to an ability of carriers, absent a contrary Commission finding, to enter into contractual arrangements to govern their operations suggests that Congress believed that other methods of arranging carrier relationships existed. Congress did not preclude the use of such other arrangements in cases in which this Commission found the contracts to be contrary to the public interest, as we did in establishing the access charge rules. See Access Charge Order, 93 FCC 2d at 156-58.

[39] MTS and WATS Market Structure Inquiry (Phase I), 93 FCC 2d 241 (1983), modified on recon., 97 FCC 2d 682 (1983) (First Reconsideration Order), modified on further recon., 97 FCC 2d 834 (1984), affirmed in principal part sub nom. National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 53 U.S.L.W. 3583, 3595 (U.S. Feb. 19, 1985), modified on

Section 201(a) authority to establish divisions between carriers is limited to joint rate arrangements. We said that "the language and history of Section 201(a) demonstrate that Congress used the term divisions in that particular provision to encompass any arrangement for the compensation of carriers that participate in a through service."[40] The parties do not discuss the Access Charge Order and do not present any compelling reason to overrule that precedent. Even if we assumed that our Section 201(a) authority to establish divisions is limited to settlement arrangements between or among carriers that offer interstate services at joint rates, Section 201(a) affords independent power to order carriers to establish physical connections. Thus, the language of the statute itself demonstrates that Congress considered through routes and division of charges to be obligations separate from the obligation to establish physical connections. Accordingly, there is no basis for inferring that the term "physical connections" as used in either Section 2(b)(2) or Section 201(a) is limited to physical interconnection involving joint rate arrangements.

21. The construction of Section 201(a) suggested by the parties is unsustainable for another reason. The second clause of Section 201(a) was added to the bill in response to a contemporaneous court ruling that had held that the common law duty of common carriers to interconnect was a contractual matter.[41] The clause therefore lists a series of powers that this Commission was to have in that context. It does not require that they be used together in all cases, or in any case for that matter. In fact, this Commission's practice has been to use the authority given us by Section 201(a) to require carriers to establish physical connections without requiring the establishment of joint rates. For example, in a dispute between Lincoln Telephone and Telegraph Company and MCI Telecommunications Corporation over the interconnection obligations of Lincoln, we ordered Lincoln to interconnect with MCI pursuant to our Section 201(a) powers without providing for joint service. Lincoln was required to file a tariff offering its exchange facilities to MCI to

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further recon., 49 Fed. Reg. 46383 (1984), recon. denied, 50 Fed. Reg. 18249 (1985), further recon. denied, 50 Fed. Reg. 43707 (1985), appeal pending sub nom. U.S. Telephone, Inc. v. FCC, No. 84-1115 (D.C. Cir. filed Mar. 23, 1984).

40 Access Charge Order at 255. In footnote 14 of that decision, we stated:

> In St. Louis Southwestern R. Company v. United States, 245 U.S. 135, 139 n. 2 (1917), the Court defined "through route" as "an arrangement, expressed or implied, between connecting railroads for continuous carriage of goods from the originating point on the line of one carrier to [the] destination on the line of another." The Court added (id.) "Through carriage implies a through rate. This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the through route . . . ."

41 Oklahoma-Arkansas Telephone Co. v. Southwestern Bell Telephone Co., 45 F.2d 995 (8th Cir. 1930), cert. denied, 283 U.S. 822 (1931); Oklahoma-Arkansas Telephone Co. v. Southwestern Bell Telephone Co., 6 FCC 809 (1939).

originate or terminate MCI's traffic.[42] Accordingly, we reject the interpretation that "physical connection" is limited to joint service arrangements.

22. Finally, we note that pursuant to Section 2(b)(2), connecting carrier status is available only to carriers that are engaged in interstate communications through "physical connections" with other carriers. A physical connection with another carrier therefore is a threshold criterion for connecting carrier status.[43] Accordingly, parties that argue that, in providing interstate access service to Contel ASC and other IXCs, CTCV is not physically connected to those carriers effectively deny the existence of a necessary condition for CTCV to be classified as a connecting carrier.

23. The plain meaning of the language of Section 2(b)(2) and the above discussion of the statutory construction arguments raised by the parties support the conclusion that CTCV is a fully subject carrier. However, several parties raise various assertions that, despite the plain meaning and longstanding construction of the statute, the legislative history supports their contentions that Congress intended that carriers like CTCV should be classified as connecting carriers. Accordingly, we shall briefly address these claims.

24. The parties argue that Congress did not intend for small companies like CTCV to be fully subject carriers. The parties are generally correct that this section was enacted to exempt certain smaller carriers from being fully subject carriers. According to USTA, Section 2(b)(2) was included to reverse an Interstate Commerce Commission precedent that had subjected carriers to full federal jurisdiction if they merely connected with interstate lines.[44] The United States

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42 MCI Telecommunications Corporation, 68 FCC 2d 1553, 1558 (1978), recon. denied, FCC 78-884 (released Jan. 3, 1979), aff'd sub nom. Lincoln Telephone and Telegraph Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981). See also, Bell System Tariff Offerings, 46 FCC 2d 413, 417-30 (1974), aff'd sub nom. Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026.

43 While the Bureau concluded, and we agree, that the special access facilities CTCV provides Contel ASC amount to a physical connection between the two carriers, CTCV's "fully subject" status is not based on that determination. Rather, that determination creates the possibility that, despite its being engaged in interstate communication, CTCV might not be fully subject to our jurisdiction pursuant to the exception provided in Section 2(b)(2). The Bureau concluded that CTCV is not a connecting carrier because its physical connection with Contel ASC fails to satisfy the statutory criterion that the two carriers not be under common control. We affirm this conclusion today. The Bureau did not reach the question--and neither do we--of whether CTCV would satisfy the separate statutory criterion for connecting carrier status, i.e., that the carrier not be engaged in interstate communication through some means other than its physical connections with other carriers.

44 See USTA Comments at 5 n. 8, citing Hearings before the Committee on Interstate

Independent Telephone Association, USTA's predecessor, appears to have been a strong proponent of the language to exempt what its president, Mr. F. B. MacKinnon, characterized as small, "individual companies."[45] However, Mr. MacKinnon conceded at one point that a company that might otherwise qualify for connecting carrier status would come under federal jurisdiction if it were part of a larger corporate structure: "[W]here a company operates in more than one state, it shall be under Federal control. We would not relieve the Federal commission of the control of that company, nor a company that is part of a group operating across state lines."[46] The language of Section 2(b)(2) excluding carriers with the specified control relationship from connecting carrier status is consistent with this statement of one of the proponents of the provision. Thus, we are not persuaded that Congressional intent was to ensure that this Commission had no jurisdiction over carriers such as CTCV.[47]

25. We note that the Bureau's interpretation of Section 2(b)(2) will not automatically subject small carriers to any significant regulatory burdens. Some very small carriers have always been classified as fully subject carriers and we have accordingly created exemptions or dual procedures in many of our rules in order to ensure that small carriers are not subject to any undue or unnecessary burdens.[48] We do not need to adopt an expansive interpretation of the Section 2(b)(2) exemption to avoid excessive regulation of small exchange carriers. We do need to tailor particular rules to avoid unnecessary burdens. We will continue to follow that policy.

26. Contel suggests that the legislative history, as reflected by a statement of Sen. Clark,[49] indicates that Congress intended that the physical connection be one with a toll line for long distance calls, and that such a

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and Foreign Commerce of the House of Representatives on H.R. 8301, 73d Congress, 2d Session (House Hearings).

45 Id. at 236.

46 Id. at 249.

47 NTCA submits that while we are reducing regulation over nondominant carriers, a holding that CTCV is fully subject will have the effect of increasing regulation on a company already extensively regulated by Virginia. Jurisdictional determinations do not depend upon dominance or nondominance, but upon the express conditions stated in the Act. Moreover, our decision does not, of course, change the regulation of CTCV because that company has been classified as a fully subject carrier for several years.

48 For example, the new Uniform System of Accounts creates a simplified version for Class B carriers who are not required to maintain all of the accounts that larger carriers must maintain.

49 See supra note 13.

connection is not present here. Contel appears to be arguing that the physical connection applies only to interstate MTS service. Such a reading is incompatible with judicial construction that has given the jurisdictional sections broad interpretations. A distinction based on the type of interstate service, (private line versus message service) is incompatible with the broad jurisdictional language of Section 2(a), and would also be a limitation on the comprehensive "engaged in interstate or foreign communication" language in Section 2(b)(2) itself. We accordingly reject such a narrow reading of our jurisdiction.

V. Ordering Clauses

27. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 3, 4(i), and 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 152, 153, 154(i), and 154(j), and Sections 1.2 and 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.2, 1.115 et seq., that the Application for Review filed by Contel Corporation on behalf of Continental Telephone Company of Virginia IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

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